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Volume 16

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 33

FEDERAL TRADE COMMISSION, PETITIONER

vs.

THE CEMENT INSTITUTE, et al.

No. 34

FEDERAL TRADE COMMISSION, PETITIONER

vs.

AETNA PORTLAND CEMENT COMPANY, et al.

No. 35

FEDERAL TRADE COMMISSION, PETITIONER

vs.

MARQUETTE CEMENT MANUFACTURING COMPANY

No. 36

FEDERAL TRADE COMMISSION, PETITIONER

vs.

CALAVERAS CEMENT COMPANY

No. 37

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HURON PORTLAND CEMENT COMPANY

No. 38

FEDERAL TRADE COMMISSION, PETITIONER

vs.

SUPERIOR PORTLAND CEMENT, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1947
CERTIORARI GRANTED MARCH 10, 1947

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WITNESSES FOR RESPONDENTS (CONTINUED).

Testimony of:

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Blair, William R.	11828, 11889, 11935
Browder, D. S.	11608
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(Testimony of Witnesses contained in pages 38274 to 40685 of the Original Transcript.)

38274 Washington, D. C.,
Tuesday, May 14, 1940.

38275 In the matter of Respondents' proffer of Exhibit, for identification, 2898-A to P, and 2899, the objection is sustained and the exhibits are rejected, and I shall strike on my own motion Respondents' Exhibit 2897.

38277 D. S. BROWDER thereupon resumed the stand and
38278 testified further as follows:

Direct Examination by Mr. Brick (Continued).

38288 Mr. Brick: If Your Honor please, in connection with Your Honor's rulings relating to the exhibits on rate matters, including Respondents' Exhibits 2829, 2899, and a few others, on which Your Honor ruled that those rates and factual matters relating to rates are immaterial, in that connection is it the intention of Your Honor that we will renew our motions to strike the exhibits which the Government offered on those subjects and which are now in the case?

Trial Examiner Norwood: I am not sure that Counsel is stating my position about that. I think not.

Mr. Brick: Well, I did not mean to state any position.

Trial Examiner Norwood: I think I ruled out matter showing how the Interstate Commerce Commission made rates, but as to any rates, actual rates that are in any ways connected with the Institute book rates, or in any way connected with any of your sales or pricing methods, I have not to my knowledge excluded them unless they are cumulative, or for some sufficient reason.

Mr. Brick: Well, I do not recall whether I have previously pointed out to Your Honor that we were de-
38289 sirous of having in the record the facts relating to the basis on which rates are generally made, so that the testimony we have had concerning various adjustments would be properly understood, and also so that we might have what I think we could call the fundamental knowledge of rate-making by the Interstate Commerce Commission, and by the railroads. That is, we did dis-

cuss the question of rates considerably, and I think Your Honor has recognized and followed the procedure of receiving Government material which did have a value as far as the matter of rates generally was concerned.

Now, these papers which we offered, particularly Respondents' Exhibit 2899, for identification, and one of the maps, which I believe was excluded, but I am not sure, show rather vividly and in a very comprehensive form the various results as far as rates are concerned, and particularly in connection with the means the Interstate Commerce Commission has given cement companies in shipping rather long distances from their mills, and I think it meets the economic testimony of each of the Commission's economists, that is, Professor Viner and Fetter, and I think one of the others.

Trial Examiner Norwood: I think Counsel is going over what we discussed in our last hearing, and I want to say that how these rates are made does not ap- 58290 pear to me to be relevant in the slightest particular. What the rates are might be, depending on the circumstances.

Mr. Brick: Well, it is what the rates are that I am interested in, Judge, and these exhibits show how they have become such.

For instance, I think it is very—

Trial Examiner Norwood: Now, that excludes that, you see.

Mr. Brick: How?

Trial Examiner Norwood: That excludes them.

Mr. Brick: It does?

Trial Examiner Norwood: If you are going to make a motion, you make whatever motion you want and I will rule on it.

Mr. Brick: Well, I move—I will put it this way, that I re-offer Respondents' Exhibit 2899 for the purpose of bringing to Your Honor's attention the fact that that exhibit shows that the cost of shipping cement 400 miles, for example, is about two-thirds the cost of shipping cement 800 miles. Those fractions are not exact, Your Honor, but with regard to the various scale rate bases which have been adopted by the Interstate Commerce Commission, of which there are seven for territory east of the Rocky Mountains, I think that that might be an example of one

of the reasons why we would like to have these
38291 papers in the record.

Trial Examiner Norwood: But what issue would that bear on,—the fact that they could ship long distances cheaper than shorter distances; is that what you want to show?

Mr. Brick: Well, that is partly it, Judge.

I think Your Honor will recall that Dr. Fetter thought that it was most unusual that mills in the Lehigh Valley, for instance, should be able to ship up into New England, whereas it has been the very purpose of the Interstate Commerce Commission in their rulings to make the mills in the Lehigh Valley competitive with the Hudson River mills, which are closer to New England.

Mr. MacIntyre: I have given that considerable study, Your Honor, and I do not think it even deserves any further study from us, from our end, because we consider it so utterly irrelevant and immaterial to the issues in the case.

Trial Examiner Norwood: Well, I think we will let the ruling stand, and you may take that up with the Commission.

By Mr. Brick:

Q. Mr. Browder, have you always had a price base at your Kingsport mill?

A. No.

38292 Q. The record shows that your company has one at the present time; and when was that base established?

A. As I recall, in October, 1935.

Q. And what were the circumstances under which it was established, Mr. Browder?

A. At that time the Tennessee-Eastman Corporation, who had been quite a good customer of ours in the past, announced quite a large building program for their Kingsport, Tenn., plant, and in order to retain the friendship of that particular company and to secure that additional business which amounted to a large volume, and to keep our competitors out as far as possible, we put in a base at Kingsport which reduced the price considerably at that place.

Q. Did you get the business of the Eastman Company at Kingsport?

A. Yes.

Q. What did you anticipate the requirements of the Eastman Company at Kingsport would be?

A. We did not know the exact volume, but we knew it was going to be a big building program which we estimated would require at least a hundred thousand barrels of cement.

By Mr. Brick:

Q. Have you shipped cement on that job?

38293 A. Yes.

Q. How much?

A. I do not know exactly, but I would estimate somewhere between, oh, seventy and a hundred thousand barrels, and the work is still going on.

Q. Now, that base, I think you said, went in in October, 1935.

A. I believe that is correct.

Q. And that prior to that time there had not been a base at Kingsport; that is, immediately prior to that time?

A. That is correct.

Q. Now, in the past had there ever been a base at Kingsport?

A. Yes, there was a base at Kingsport at the time of the merger, at which the Penn-Dixie Company was formed.

Q. Was that in 1929?

A. Yes, it was in 1929, the early part of 1929. It was in effect in 1926, as I recall it now.

Q. And why was that price base not continued, Mr. Browder?

A. Well, at the time the price bases in the Birmingham district were reduced quite extensively, it simply made the Kingsport base inoperative, and wiped it out entirely. In other words, the price in the City of Kingsport was based on the Birmingham low base, was less than our base price, and it made our base price simply inoperative, and it disappeared.

38294 Q. And it did not reappear until the Eastman business developed?

A. No, at the time of the increase in the base at Birmingham our company, in meeting that competition, mailed out quotations which did not take our base into consideration. In other words, it was eliminated by the issuance of those quotations.

Q. Now, with respect to your Clinchfield mill, Mr.

Browder, did it have a price base when Penn-Dixie was organized?

A. As I recall it, it did. Yes, it also had a base.

Q. And has it continued?

A. No.

Q. Under what circumstances was it discontinued?

A. For the same reason that I have just explained as to Kingsport, the low Birmingham base simply made that base that was in effect at Clinchfield inoperative.

Q. Since you have been with the Penn-Dixie Company, Mr. Browder, has the price base at your Richard City plant been such that it established the price on the N. C. & St. L. Railroad?

A. Yes.

Q. And was it effective at any other points?

A. During part of the time that it was a base in effect only for the N. C. & St. L., it did not affect any other points.

Q. Well, will you explain that situation?

A. Yes.

When the Birmingham base was reduced to such a low point that our Richard City, Tenn., base was made inoperative, we found that the delivered prices at points, certain points on the N. C. & St. L. Railroad, for instance at Alabama City, Ala., was less than our price base which we used in quoting the N. C. & St. L. for delivery at our mill. In other words, the N. C. & St. L. could buy from the Birmingham mills for delivery at Alabama City at a lower price than we were quoting by the use of our price base, and we therefore reduced our price base to a figure which was one cent less than the price at Alabama City, and it still did not make the price at any adjacent point within 5 miles of our mill, but it did enable us to hold the business of the N. C. & St. L. Railroad, which we had been enjoying in the past.

38205

Q. The result of that was that you quoted a price which was lower than the price at Alabama City?

A. That is correct.

Q. Had the N. C. & St. L. Railroad been a large consumer of cement?

A. They had bought from us consistently. I do not recall the volume though, now.

Q. Now, for how long did that situation continue, Mr. Browder; that is, having a price base at the Richard City

mill which made only the price for the railroads which you mentioned?

A. As I recall it, it was the latter part, I think 38296 about November, 1929, up until early in 1932.

Q. And what happened at that time?

A. At that time the Birmingham price base was increased, and in meeting that competition our Richard City base was also increased, and under the new adjustment there Richard City again became a regularly established price base and made the delivered prices at various points around the mill.

Q. Prior to that time, Mr. Browder, in 1931, was the price base at the Richard City mill reduced so that it would make prices at points other than on the railroad or for the railroad?

38299 A. Not immediately prior to that. There had been a time prior to that when Richard City was a base. Then, as I stated, that base became inoperative, and the base was put in then one cent less than the Alabama City price for quoting the N. C. & St. L., and that particular price base did not affect any territory, even the first station, which is only about five miles from our own mill.

Q. Mr. Browder, since you have been with the Penn-Dixie Company, has it initiated any bases at non-producing points?

A. Yes.

Q. Now, at what points has your company established bases at non-producing points?

A. Well, on October 26, 1935, we established price bases at the South Atlantic Coast points of Wilmington—I mean Charleston, S. C., Savannah, Ga., and Jacksonville, Fla.; and later, in February, I believe February 22, 1936, we established additional price bases at Wilmington, N. C., and Brunswick, Ga.

Q. Are those you mentioned correct? Are you 38300 sure of them, Mr. Browder?

A. That is my recollection.

Trial Examiner Norwood: Now, all those were established to meet foreign competition?

A. (Continuing) No, I am wrong about that. It is October 26th—

Trial Examiner Norwood: Read my question.

(The Trial Examiner's question was read.)

The Witness: That is correct.

By Mr. Brick:

Q. Are these bases still effective?

A. No; they have been eliminated.

Q. While the Examiner was interrogating you, Mr. Browder, I think you were changing an answer with regard to dates. Will you complete that, please?

A. Yes. I think that the Charleston, Savannah, and Jacksonville base was made effective in October, '36, and the Brunswick and Wilmington bases in February, '37. I was just a year earlier there, I think.

Q. And when did you abandon the use of these points as bases?

A. We abandoned the use of those base points, as I recall it, in the latter part of 1937 by mailing out broadcast quotations which did not take those bases into effect. However, all of our competitors did not meet those quotations and continued the use of the lower prices based on
38301 the ports, and we had to withdraw those quotations and go back to the lower price.

At that time,—I believe it was early in 1938,—someone—not ourselves—some competitor of ours mailed out quotations, which we followed, and those were subsequently followed by everybody. So, as I recall it, it was in '38 when they were taken out.

Q. Now, what was the nature of those last quotations to which you refer as having been sent out by a competitor?

A. They increased the prices in the coastal territory by the elimination of those port price bases. In other words, they were not taken into consideration in mailing out those quotations.

Q. You have said, Mr. Browder, that these bases at non-producing points were established by your company because of the imported cement situation. Will you explain just how the establishment of bases at these coast points you have mentioned assisted in competing against the imported cement?

A. Well, at the particular time that those bases were established there was quite a large highway program coming out in Georgia involving, as I recall it now, about 230,000 barrels of cement, and practically all of that work was along the coastal area, and there was a threat of foreign cement being used in all of that highway work, and to offset that and to hold that business, we put in these price bases.

Trial Examiner Norwood: Now, were those bases
38302 equal to the price of the foreign cement at the port?

The Witness: Not exactly, Judge. No, sir. It was a little bit higher, but we felt that we could control the sale with a slightly higher price than was in effect on foreign cement due to many factors that are involved there.

By Mr. Brick:

Q. Why were these particular points selected; Mr. Browder?

A. Well, they were all in proximity to the jobs in question. Some of the jobs were in the southern part of the State. It would be affected by the foreign cement coming through Jacksonville, some in the central part, it would be affected through Savannah. And, as I recall it, too, there was some additional work in South Carolina; but it was not as much as there was in Georgia, so it was put in at those three points first.

Q. Now, were those points points to which foreign cement was shipped from abroad?

A. That is correct.

Q. And what relation did your price at those points have to points going inland?

A. The prices at the ports were considerably lower than they were at the interior points just back from the port. In other words, as you went inland from the ports your prices were increasing, until they finally reached a
point in the interior near a mill where they started
38303 decreasing as they went towards the mill.

Q. Was there any difference in the price relationship as you have explained it in connection with these non producing ports on the one hand and a producing point where there is a mill with a price base on the other hand?

A. No. We figured that there was a supply of cement at these ports, which was the foreign cement. It was giving us the same competition in the same way as domestic cement mills will give us, and we met that competition in this way.

Q. Mr. Browder, do you recall an invitation for bids by the Navy Department which were opened on December 8, 1936?

A. Yes.

Q. Did Penn-Dixie submit a bid in connection with that letting?

A. We did.

The witness identified Resp. Ex. 2913-A to K as "our" office copy of "our" bid submitted to the U. S. Navy Department on their schedule 9346 for opening December 8, 1936.

38304 Q. Did Penn-Dixie quote its current published prices for Brooklyn, Portsmouth, and Boston?

A. Yes.

Q. Who got the awards with regard to the work at those points?

A. The Lehigh Cement Company.

38305 Q. Shortly after this letting, was there or was there not a new market price for cement at the points which I mentioned, Mr. Browder?

A. There was.

Q. And on what basis were those prices developed?

A. On the basis of the prices which were quoted by the Lehigh Company on their bid to the Navy Department.

38306 Q. Mr. Browder, do you obtain the results of bids made in connection with federal work for any service?

A. In several cases we do, yes.

Q. Who supplies that service?

A. There are several of them. We get that service from the bonding companies in some cases; in some cases from parties that we employ to give us tabulations.

Q. Is it a policy of your company to investigate the results of all bids made in connection with Government work on which your company has bid?

A. Yes. We try to have one of our representatives there if possible, and if not we get the information from other sources.

Q. And do the bonding companies render that service gratis?

A. Yes.

A. Yes. The bonding companies do it as a service in connection with advertising, I presume.

38307 Q. Mr. Browder, do you participate in the preparation of Penn Dixie's bids on Government work?

A. Yes.

Q. And are you familiar with Penn Dixie's policy with respect to the price it quotes on governmental sales?

A. Yes.

Q. Has the Federal Government, or any other public

body, ever in your experience demanded special price consideration of the Penn-Dixie Company?

A. Yes, we have had instances of that kind.

Q. In connection with what work?

A. The T. V. A. is an illustration.

38308 Q. Have you ever bid lower than your commercial prices to the Federal Government?

A. No, except in connection with, as I said, with the T. V. A., and where there are land-grant rates involved.

Q. Did you bid in connection with any of the work relating to the construction of the Tygart Dam?

A. Yes, we bid on the Tygart Dam.

Q. And did you bid your commercial prices with regard to the Tygart Dam?

A. No, the prices were lower than the Tygart Dam, on the Tygart Dam.

Q. Did the Penn-Dixie Company submit a bid in connection with T. V. A. work on a letting of March 19, 1934?

A. Yes.

Q. And where was that cement to be used?

A. On the Norris Dam and the Wheeler Dam.

Q. Had there been any invitations for bids by T. V. A. prior to March 19, 1934?

A. Yes, there had been quite a number of bids for small amounts, varying from one car up to two or three thousand barrels, as I recall it.

38309 Q. Did Penn-Dixie bid in response to those requests?

A. Yes. We bid on all that we had any notice they were taking, and I think that we got all of the notices.

Q. Did you participate in the preparation of those bids?

A. Yes.

Q. In those cases, Mr. Browder, what form of bid did the Penn-Dixie Company submit?

A. We submitted prices f.o.b. the mill; that is, I understand you to mean these earlier bids in small quantities?

Q. Yes.

A. That is right.

Q. Do you recall whether or not you were awarded any of that business?

A. My recollection is we only received the award on two small lots.

38310 Q. Mr. Browder, I show you Respondents' Exhibit, for identification, 2914-A to Z, and ask you what those papers are?

A. This is the office copy of Penn-Dixie's bid to the Tennessee Valley Authority for March 19, 1934, and our covering letter submitting the bid.

Q. Do the papers appearing in Respondents' Exhibit 2914-A to Z, constitute all of the conditions and provisions relating to the bid which your company made in con-
38311 nection with that letting?

A. Yes.

Examination on Voire Dire by Mr. MacIntyre.

Q. Mr. Browder, referring to Respondents' Exhibit, for identification, 2914-E, which is the fifth page, what does that mark mean that appears on that sheet encircling the fifteen and ending in an arrow just before the word "five"?

Mr. Brick: I object to that question; if it is a pencil notation. If it is, I did not offer it. I will merely say that I am not offering the pencil notations appearing on the exhibit, which is consistent with the regular practice, but I will withdraw the objection.

Trial Examiner Norwood: I think we can find out that. The objection is overruled.

A. As I understand it, this just refers to the point where the arrow is that comes in after the "15 days" there.

By Mr. MacIntyre:

38312 Q. Well, what does the arrow and the circle and the 15 mean?

A. Mr. MacIntyre, I understand it means just what it says. The bid is held open for acceptance for 15 days subject to withdrawl on five days' notice, as required by the Code of Fair Competition for the Cement Industry. In other words, this notation that is put in here, there are no —there was no space for it on the mimeographed invitation that was sent out by the T. V. A., and that this is added with the arrow pointing to it to show that it came in right at that place after the "15 days."

Q. Well, should the "15" appear on the line where it appears and also preceding the "5," is that what the arrow means?

A. The "15" should appear where it does on this blank space, where it says, "Acceptance of this bid within blank," we added the "15" there, days, then should follow that—this notation to which the arrow points, which reads, "Sub-

ject to withdrawal on five days' notice as required by the Code of Fair Competition for the Cement Industry."

Q. Well, do you mean to say that it was subject to withdrawal on five days' notice; is that what the arrow means?

A. No, the bid was submitted for acceptance within 15 days.

Q. The arrow has no place on the circle?

A. Oh, yes, it has.

Q. Well, what is its significance if it has a place?

A. As I just said, the bid was made for acceptance within 15 days from the date of the opening of the 38313 bid, but we reserved the right to withdraw that bid at any time on five days' notice.

Q. Well, why is the arrow included encircling the 15 and pointing to the five?

A. As I just stated, this insertion, which was required by the Code, follows the 15 days that we have there, that is where that should come in, instead of—

Q. That did not appear on the original bid, did it, that was submitted, the arrow encircling the "15" and pointing to the five?

A. I would understand it did, to show that this clause appears on that, came in on that point.

Q. It is your testimony it does appear on the original?

A. This is supposed to be an exact copy of the original, and I understand it did.

Q. With the arrow and the circle and all?

A. That is right.

(RESP. EX. 2914-A to 2914-Z was offered and 38314 received in evidence.)

Direct Examination (Resumed) by Mr. Brick.

Q. Now, it appears from this exhibit, Mr. Brower, that your company quoted prices f.o.b. your Richard City and f.o.b. your Kingsport mills for the Norris Dam, and f.o.b. your Richard City mill for the Wheeler Dam.

A. Yes.

Q. Will you explain how you arrived at the prices which you quoted in connection with the bids?

A. Yes. We took the destination cost prices which had been filed with the Code Authority by one of our competitors, and deducted from those destination costs our full commercial rate and bid the remaining figure as the price f.o.b. our mill, as we had been bidding in the past.

Q. What were your commercial rates, Mr. Browder, from your two plants to the destinations which I mentioned?

A. As I recall it, the rate from Kingsport to Coal Creek was 12½ cents; from Richard City to Coal Creek was 15 cents, and from Richard City to Sheffield 12½ cents a hundred pounds.

Q. In each case those rates are hundred pounds; is that right?

A. That is correct.

Q. Now, what were your reasons for your bidding 38315 in that manner?

A. We simply followed the practice that we had been following in the past, and we understood that complied with the filing which had been made with the Code Authority.

Q. Now, did you file your f.o.b. mill prices with the Code Authority?

A. No, we did not. We considered it was equivalent of the price which had already been filed, and made no further filing.

Q. Now, your bid also shows that you quoted $2.16 in bulk f.o.b. barges, Wheeler Dam. Where did you get that price, or how did you determine it?

A. That was a price that was filed with the Code Authority by one of our competitors, and we simply met it.

Q. Did Penn-Dixie receive any part of the awards made in connection with the letting of March 19th?

A. Yes. As I recall it, we received 45,000 barrels on the Coal Creek project, and none on the Wheeler.

38316 Q. Mr. Browder, I show you Respondents' Exhibit, for identification, 2915-A to Z-4, and ask you what it is?

A. It is a photostatic copy of T. V. A. contract No. 424, which we entered into with the T. V. A. covering the 45,000 barrels that we were awarded on the Norris Dam project in accordance with those bids taken March 19th.

Q. Now, was this contract—was this the contract Penn-Dixie entered into with T. V. A. on the basis of Penn-Dixie's bid of March 19, 1934?

A. Yes.

Q. On what basis was this contract written in connection with that price?

A. Well, it was written on the basis of our bid which

was correctly priced f.o.b. Kingsport and Richard
38313 City, and also on the basis of the—that is all. There
was no further.

Q. Were there any provisions with regard to—I will withdraw that question.

May I show you, Mr. Browder, Commission's Exhibit 406-A and B, and ask you if that bears any relation to the bid which you submitted to the T. V. A.?

A. Yes.

Q. Now, on this exhibit, Mr. Browder, that is Commission's Exhibit 406-A and B, it indicates a rail freight rate from Richard City and Coal Creek to be 10 cents per hundredweight, and from Kingsport to Coal Creek at 9½ cents per hundredweight.

A. That is correct.

Q. Now, are those rates correctly stated as of the date appearing on that exhibit?

A. Yes, those rates are correct for this particular movement. They were not the commercial rate. Those were special rates which had been provided by the railroad for this particular movement.

Q. And were they provided before or after March 19, 1934?

A. They were provided after the letting of
March 19.

38318 Q. Now, Mr. Browder, did the contract which your company entered into with T. V. A., which you have identified as Respondents' Exhibit 2915-A to Z-4, contain any provisions which would allow the Government a benefit in connection with any reductions in freight rates?

A. It did.

Q. And was there any destination cost provision incorporated in that contract, referring again to Respondents' Exhibit 2915-A to Z-4?

A. May I see it again, Mr. Brick?

Q. Yes, sir (handing the document to the witness).

A. Yes, there was a provision for the destination cost in the contract.

Q. And you mentioned that T. V. A. did have the benefit of rate reductions which became effective after March 19, 1934?

A. That is correct.

Q. Now, will you state just about when, if you know, those rates became effective?

A. As I recall it, the rates became effective in May, about May 10 or 11, I think, 1934.

Q. And what were the circumstances which gave
38319 rise to those rates?

A. Well, the Tennessee Valley Authority was threatening to truck cement from the mill of the Volunteer Portland Cement Company at Knoxville to their Coal Creek project, or their Norris Dam, and the railroads to meet that situation agreed to make a reduction of 3 cents per hundred pounds in the rate from Knoxville to Coal Creek, and to prevent any discrimination with the other companies they also made the same reduction in rate from the other companies receiving awards under this particular bidding, which included Kingsport, Richard City, and Chattanooga.

Q. Now, I believe you have mentioned, Mr. Browder, that your contract with T. V. A. contained both destination cost price and an f.o.b. mill price; is that correct?

A. That is correct.

Q. And on which basis did the T. V. A. take delivery under your contract?

A. On the destination cost basis with the freight prepaid.

Q. And did the T. V. A. obtain the benefits of reductions which had been granted?

A. Yes.

Q. That is the reduction in rail rates?

A. That is right. The reduction of 3 cents per hundred pounds.

Q. Now, referring again, Mr. Browder, to Com-
38320 mission's Exhibit 406-A and B, which is Mr. Garity's memorandum of July 18, 1934, are the rates other than those from Kingsport, Richard City, Knoxville, and Chattanooga correctly stated as of the date of the exhibits—that is, rates from the points I mentioned to Coal Creek?

A. No. These rates on here from the other points which are Phoenixville, North Birmingham, Leeds, Cowan, Nashville, were never made applicable by the railroads.

Q. Now, were any of your shipments under the contract made at the old rates which were applicable to May, 1934?

A. No. No shipment moved until after the special rates had become effective.

38325 Q. Mr. Browder, did you participate in any discussions among representatives of the cement companies and representatives of the Tennessee Valley Au-

thority concerning the furnishing of the cement for that Authority's projects?

A. Yes.

Q. What was your connection relative to these discussions?

A. Well, after Dr. Morgan had abandoned his so-called fair price study of the cement situation and indicated that the T. V. A. would build a mill at Sheffield, unless he got satisfactory cement prices, I was called in and acted as a traffic consultant and secretary for the industry committee that was—that had previously been and continued to deal with the T. V. A. relative to that situation.

Q. Who was the secretary of the committee?

A. There was no official secretary. I acted as secretary.

Q. Did you attend all of the meetings of the committee?

A. Yes, after the period I mentioned.

Q. And did you come in contact with representa-
38326 tives of the T. V. A. in connection with their cement requirements?

A. Yes.

Q. With whom?

A. With Dr. Morgan; with C. H. Garity, Director of Purchases; Mr. L. B. Rockwell, the traffic supervisor; Mr. W. R. Chambers, one of their engineers. I think his title was "Principal Engineer." I am not sure about that, though. And quite a few of the other T. V. A. representatives.

Q. Mr. Browder, I show you Respondents' Exhibit, for identification, 2201-C to Z-71, and ask you what it is and what connection, if any, you had with it.

Mr. MacIntyre: If Your Honor please, we object to going into this. We do not question the identification of this document as given by Witness C. F. Lewis, one of the Respondents' witnesses. We do object to the taking the time in this hearing room any further concerning that document, because of its irrelevancy and immateriality, which has already been passed upon by Your Honor. We are just wasting time. It has been rejected because of its immateriality and irrelevancy to the issues here.
38327

Mr. Brick: Does that mean Mr. MacIntyre waives identification?

Mr. MacIntyre: I certainly do.

Mr. Brick: On the basis of the waiver, I withdraw the question.

38328 The witness prepared Part 2 of Resp. Ex. 2201-A to Z 71, beginning at Resp. Ex. 2201 Z 56 through
38329 Z 71. He prepared this part of the report just mentioned at the request of Blaine S. Smith, chairman of the committee. Upon its completion it was submitted to the committee for their approval, and with some slight rewording, and a little editing on their part, it was incorporated as Part 2 of this report.

By Mr. Brick:

Q. Did you discuss, Mr. Browder, with the members of the so-called Industry Committee changes which they suggested in connection with the original draft prepared by you?

38330 A. Yes.

Q. And did the committee adopt the draft as you have prepared it subject to those changes to which you made reference?

A. That is correct.

Q. Do you know what the committee did with the general report?

A. Yes. The two copies of the report were mailed to Dr. Morgan, who was at that time the chairman of the T.V.A. Board.

Q. And what, Mr. Browder, was the purpose of that part of the report which you prepared?

A. Well, in our discussions of the proposed Sheffield plant with Dr. Morgan, he had stated that they expected to not only supply the requirements of the T.V.A. projects, but that they also would keep this mill running to capacity by furnishing cement to other governmental agencies requiring cement, and to State highways, departments, and to commercial shippers in the territory that they could serve, and particularly those towns along the Ohio and Mississippi Rivers that could be reached by water from the Sheffield plant; and those sections that I drew up there are simply to show the situation existing so far as the Sheffield plant was concerned in making deliveries to those particular points.

Q. And what was that condition which existed?

Mr. MacIntyre: I object. It is irrelevant and immaterial to the issue that was raised by the Commis-
38331 sion's evidence on this point; namely, that of collusion among the cement manufacturers in arriving

at the place that they quoted T.V.A. I object to the line.

Trial Examiner Norwood: You are confined to the issues in the case, and I will not receive anything that is not relevant thereto, and I will not receive that until you show me its relevancy, unless I can see it myself.

38335 By Mr. Brick:

Q. We were discussing, Mr. Browder, various points to which T.V.A. officials had thought they could sell or ship cement from a plant at Sheffield.

Did you make any study of the possibilities of barge shipments from the proposed Sheffield plant to points other than where T.V.A. projects were located?

A. Yes.

Q. Did you find that the proposed T.V.A. plant would have any advantage by way of water shipments over other sellers of cement?

Mr. MacIntyre: That is objected to as irrelevant and immaterial.

Trial Examiner Norwood: The objection is sustained.

Mr. Brick: At this time I will re-offer Respondents' Exhibit, for identification, 2201-Z-56 to Z-71, that
38336 being the part of the report which the witness personally prepared.

Trial Examiner Norwood: Now, to show what? What do you want to show by that?

Mr. Brick: To show, if Your Honor please, the activity of Respondent Companies which were interested in that T.V.A. situation, and to show what they did in connection with the matters to which Dr. Morgan and other Commission witnesses testified.

Trial Examiner Norwood: To show that they did what?

Mr. Brick: That they submitted the exhibit which I have offered. I want to show first what they did; that is they did put down in black and white certain facts which they presented to the officials of T.V.A. This witness has testified as to the purpose of the exhibit; that is, the purpose of preparing the report and the circumstances which existed at the time, and the fact that he mailed the report to Dr. Morgan, and I think as far as the materiality and relevancy of the facts contained in that portion of the exhibit which I am offering might be concerned it just speaks for itself.

Trial Examiner Norwood: I think that you might let me know what it shows which bears on the issues in any way. What is the feature there that bears on the issues.

Mr. Brick: Well, I do not think I could make it
38337 any plainer, Judge, than to say that the Commission has put in issue the propriety of the activities of these particular Respondents who were interested in the T.V.A. situation.

Now, all I want to do—and they offered merely—they offered evidence apparently because it looked suspicious to them, and that is all in the record, as Your Honor is aware. We have hundreds, probably over two or three thousand papers relating to the T.V.A. situation in the record. Now, I would like to complete the picture and put in the matters which the Government for its own reasons did not offer. Then when the Government makes its argument we will at least have before the Commission the entire situation so that we can have a clear-cut demonstration of what the facts might be.

Trial Examiner Norwood: I would like to know how these papers complete the picture. In what respect does it complete the picture?

Mr. Brick: Well, Dr. Morgan testified that he told the cement companies certain things. The cement companies told Dr. Morgan certain things in reply. One of the things they told him was the contents of this report.

Mr. MacIntyre: Are you ready for an objection on this if we have any?

Trial Examiner Norwood: Yes.

38338 Mr. MacIntyre: We object to this as incompetent, irrelevant, and immaterial.

I want to call Your Honor's attention to the fact it has resulted in exactly what I pointed out when my objection was raised, going to this line. It brought back into the picture here, and it has taken a half hour, irrelevant matter that goes to the cost or what the speculative cost would be of the T.V.A. plant as well as what costs are alleged to have been of other plants operating in the T.V.A. Valley district, and all that is offered in addition to that is an argument raised by this committee represented by this witness representing the industry as to why T.V.A. should not build a mill. That is all that there is to the offer, and it is not relevant or material to any of the issues in the case.

Mr. Brick: You are speaking of costs. We are talking about destination costs.

Mr. MacIntire: Mill costs, and it is shown on the last page of that exhibit.

Trial Examiner Norwood: I do not think it is relevant, and if there is any similar material still remaining in the record of the same nature I shall entertain a motion to strike that. In the meantime, I will sustain the objection to this.

Mr. Brick: When Your Honor makes reference to other similar material, does that refer to evidence
38339 that does not show any particular reference to collusion on the part of the companies, but merely indicates some of the activities of the industrial group? I do not know just how far Your Honor intended to go in connection with the matters which would be subject to such a motion to strike?

Trial Examiner Norwood: We have struck a number of things. At least, they have been withdrawn, or struck with the permission of the Commission's Counsel,—a number of papers relating to costs, and so forth. The only relevant point there is the fact that the proposal was made to build a Government plant, and that thereafter a certain price formula was adopted as between these Respondents and the—

Mr. Brick: T.V.A.

Trial Examiner Norwood: —and the T.V.A.

Now, I do not say just how important that is or what the finding is going to be on it, but how are they reached? The conclusions that they reached there cannot be relevant in any way whatsoever. The figures that they considered in there are not relevant here, and we must not waste any more time on that. I do not say that that is all-inclusive, I do not know whether that covers all the points of
the T.V.A., but certainly it is very clear that this
38340 material here is not relevant and should be rejected.

Mr. Brick: I wonder if it would be permissible for me to ask Mr. Wooden what, in connection with the exhibits and testimony he offered concerning T.V.A., he relies on in connection with his attempt to establish collusion on any of the T.V.A. matters.

He has withdrawn some exhibits relating to cost after we had shown that certain of those cost and price matters were reasonable, and that matter was stricken, and he withdrew some of his exhibits.

Now, as I understand, the justification for the remainder of the T.V.R. exhibits being in the record is that they have something to do about collusion.

Well, now, I wonder if he would be so kind as to let us know what or which of those exhibits he relies on in connection with his proof of collusion.

I think some of them, he has stated, appear to be suspicious looking, but I do not know of any direct evidence of collusion in that situation; yet there are two or three thousand papers on this subject. Now, I do not think that we should be put in the position of being in the dark as to what he is going to do with that material. If he is not going to do anything with it; if he does not expect to make any argument from it, and he says so on the record,
38341 then we won't go into it; otherwise I think the door should be open to us to explain all of the activities of this industry group; that is, why they performed certain activities, and what they did about it,—the general purposes of it.

Mr. Wooden. Your Honor, I thought this question had been answered before. I think it has been. I intended to make it clear that were not relying upon anything in the record that related to costs or the reasonableness or fairness of prices per se in the case of T.V.A. or any other instance.

I withdrew from the record and moved to strike such things as might give Respondents cause or reason or excure to go into that subject. I would withdraw anything further of that sort, but I do not think there is anything further of that sort.

I would say as to what is in the record, I propose to use it for whatever purpose it may serve, some of which I may not have in mind at this time, and cannot foresee until I can study them in their relation to the other exhibits and other portions of the record. So long as it is in the record it can be used for such purposes, unless it is specifically limited.

I do not think there is anything further.

Trial Examiner Norwood: Are there any exhibits
38342 in there that show calculations and so on in order to establish the fact of their negotiations here?

Mr. Wooden: Why, there is correspondence and memoranda and minutes of such negotiations, yes. Their history of negotiation with T.V.A. is in the record.

Trial Examiner Norwood: In other words, you are not seeking to draw any inferences except those relating to collusion or agreement?

Mr. Wooden: Combination, collusion, or agreement—I don't think of anything else, Your Honor.

Trial Examiner Norwood: And no relevancy attaches to the figures submitted by either side?

Mr. Wooden: I beg your pardon?

Trial Examiner Norwood: Read that.

(The Trial Examiner's statement was read.)

Mr. Wooden: Yes. No relevancy in the figures on costs or any of the other subjects.

Trial Examiner Norwood: Proceed.

Mr. Brick: May I know the state of the record? Is there a question pending?

The Reporter: No.

Mr. Brick: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Brick:

38343 Q. Mr. Browder, did you consider, in connection with your T.V.A. work and studies, whether the proposed Sheffield plant would have any advantages over competing cement mills in connection with water shipments?

Mr. MacIntyre: Objected to as irrelevant and immaterial. It is the same question.

Trial Examiner Norwood: Sustained.

Mr. Brick: I offer to prove in that connection, if Your Honor please, as to all of the points upstream beyond Gunthersville there were commercial plants located on the river that would have a shorter tow than the Sheffield plant would have, and downstream beyond Danville there were commercial plants located on the rivers that would have a shorter tow than the Sheffield plant would have, and that there were no large consuming markets in the area on the Tennessee River from Danville, Tenn., to Gunthersville, Ala., other than T.V.A. projects.

Trial Examiner Norwood: Counsel has his exception.

By Mr. Brick:

Q. Did you obtain, Mr. Browder, any barge rates in connection with shipments that could be made from the proposed Sheffield plant?

Mr. MacIntyre: Objected to as irrelevant and immaterial.

Trial Examiner Norwood: Sustained.

38344 Mr. Brick: May I have this one sheet marked, please, as Respondents' exhibit, for identification.

(The document was marked for identification "Respondents' Exhibit 2916.")

By Mr. Brick:

Q. Mr. Browder, I will show you Respondents' Exhibit, for identification, 2916, and ask you what it is.

A. This is a pencil memorandum that I prepared showing estimated distances and estimated barge rates for transporting cement from Sheffield to points on the Ohio and Mississippi Rivers.

Q. Did you prepare these figures personally?

A. Yes. Most of them—some of these were drawn up under my supervision by my assistant Mr. H. A. Henderson.

Q. And what was your source of information in connection with preparing these figures?

A. These distances I show were taken from river charts wherever I could secure them, and then by measured distances on—scaled distances on maps where that was not available to me.

Q. And how about the cost figures, the shipment?

A. Cost figures are based on an average rate of 6 mills per ton per mile.

Trial Examiner Norwood: Where did you get that?

The Witness: The cost figure is such a variable figure,

and it always has to be based on the size of the

38345 movement, the regularity of the movement, and the extent of the movement, but I took that figure because in certain cases the district engineer at Memphis has used that figure in tabulating his bid that involves towing cost beyond various rail heads, and I just used that as an illustrative figure.

By Mr. Brick:

Q. And what use did you make, Mr. Browder, of these figures?

A. These figures as to the mileages from the Sheffield and other cement producing points along the river were submitted to the T.V.T. The cost figure was not submitted to them, as it was figured it was so indefinite due to the fact that there was no known movement, or the extent of the

movement, or the volume of the movement, that it would be best to leave that out and let the distances speak for themselves.

Q. And—

Trial Examiner Norwood: Now, I think you need not waste any more time on that paper. It is evidently the same kind of material that has just been rejected here, some sort of figures that were submitted to these people in the T.V.A. as bearing upon costs of delivering cement, and so forth, and the advisability of building a Government plant. Isn't that correct?

Mr. Brick: Partially, Judge.

Well, let me expedite its exclusion then by not
38346 asking any further questions.

Trial Examiner Norwood: Yes.

Mr. Brick: And I will offer it now with the statement that we want it in the record to show the action of the industry committee with regard to its work in figuring the costs on these barge shipments, and it was in support and consistent with their position in advising the Tennessee Valley Authority that it could not ship advantageously or at better rates than any of the then existing cement mills, and that wherever it might have had an advantage that advantage would have only been to points where cement was not consumed, or there was no demand for it.

Mr. MacIntyre: That is objected to as incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: Sustained.

By Mr. Brick:

Q. Now, Mr. Browder, you testified that you mailed a report on behalf of the so-called Industry Committee to Dr. Morgan.

A. I did.

Q. Was any conference had among the members of that committee and officials of the T.V.A. concerning that report?

A. Yes, there was a conference held shortly after the report was mailed.

Q. And when did that conference take place, Mr. Browder?

38347 A. My recollection is it was about September 4 and 5 in 1934, just after the report was mailed in August.

Q. And where was that conference held?

A. In Knoxville, Tenn.
Q. Did you attend the conference?
A. Yes.
Q. Between the time that you mailed the report to Dr. Morgan and the time of the meeting to which you made reference, did you personally come in contact with any of the members of the Tennessee Valley Authority?
A. No.
Q. I bring to your attention, Mr. Browder, Commission's Exhibit 562-12-Y to 13-J, and ask you—
Trial Examiner Norwood: Was that something he has to do with?
Mr. Brick: This particular paper, Judge, which is a Commission exhibit, is a so-called memorandum of a meeting with the T.V.A. officials on September 6 and 7 at Knoxville, and although the witness mentioned the 4th and 5th of September, I believe this refers to that particular meeting.
Trial Examiner Norwood: Is this witness supposed to be present at that meeting?
Mr. Brick: That is one of the questions I was going to put to him.
38348 Trial Examiner Norwood: Yes.

By Mr. Brick:

Q. Is the exhibit which I have just mentioned—
Trial Examiner Norwood: I think you can bring out the facts without showing him that, unless it is something—unless his name is in there appearing somewhere.
Mr. MacIntyre: Well, his name is in there, Your Honor, but we still object to them showing him the minutes of the meeting which he did not draw up, and asking him whether or not he can contradict them. If he has anything to say as to what occurred at that meeting, let them ask him what occurred, and let his testimony stand against the minutes.
Trial Examiner Norwood: I think the Counsel is right about that. Don't show the witness that exhibit at all.
Mr. MacIntyre: Nothing could be more suggestive as to what they want him to contradict, and leading.
Mr. Brick: May I ask the witness if he had anything to do with the preparation of the report?
Trial Examiner Norwood: Oh, yes, you may ask him that.
Mr. Brick: That is, I do not know the answer, but I would rather rely on the witness than Mr. MacIntyre.

Trial Examiner Norwood: Ask him if he prepared any minutes.

By Mr. Brick:

Q. Did you prepare any minutes, Mr. Browder, or any report in connection with the meeting to which you referred?

A. I did.

Q. I show you Commission's Exhibit 562-12-Y to 13-J, and ask you if you prepared those minutes or that report, or any part of it?

A. Yes, I prepared this report.

Q. And is the reference to the meeting on 562-12-Y, which it states took place September 6 and 7 at Knoxville, the meeting which you have been discussing in your testimony?

A. That is correct.

Q. Is that the one that took place for the purpose of discussing the report, a part of which you prepared?

A. Yes. I remember it was early in September. I was mistaken as to the exact date.

Mr. Brick: Well, if Your Honor please, we are in somewhat of an odd situation, now. We have in the record the minutes of a meeting, and an offer of the report which was the sole purpose of the meeting has been excluded. Now, I do not want to try Your Honor's patience, but I would like to know whether it would be proper for me to make a re-offer of the excluded report.

Trial Examiner Norwood: I think the only relevant point there is whether or not there was a report offered. What the report was means nothing. I think the record is in very good shape on that.

Mr. Brick: Well, at this time I renew our motion to strike Commission's Exhibit 562-12-Y to 13-Q, which purports to be the report of a meeting which was called for the purpose of discussing the report which has been excluded.

Trial Examiner Norwood: I shall examine that and take your motion under advisement.

Proceed.

Do you wish to examine him on this any further?

Mr. Brick: Well, I have a few questions to ask him on it, Judge.

Trial Examiner Norwood: Go ahead.

Mr. Brick: I think I can hold in abeyance most of them.

By Mr. Brick:

Q. In that exhibit, Mr. Browder, the one I last referred to as being the report of the meeting, there is a reference to the Industry Committee having challenged the freight rates from Sheffield, which were used, being contemplated by T.V.A., and referred to in T.V.A.'s statement prepared by it for the Industry Committee.

Do you recall that?

38351 A. Yes.

Q. Now, what was the industry committee's objection to the rail rates shown on Sheffield and other points in those statements which had been prepared by the T.V.A.?

A. Well, the rail rates they had shown in the statement from Sheffield were not published in any tariff; they were not the published tariff rates. In other words, they were special rates which the T.V.A. thought they could secure from the railroads as these projects came along.

Q. And did the industry committee, in connection with this subject, take into account only the actual freight rates which were then applicable from Sheffield?

A. That is correct.

Q. And from what source did you secure the commercial rail rate from Sheffield?

Mr. MacIntyre: That is objected to as immaterial detail.

Trial Examiner Norwood: The objection is sustained.

Mr. Brick: Well, I offer to prove that the rates to which I referred in the question were secured from the southern cement tariffs.

Trial Examiner Norwood: Now, I want to understand your motion here.

Mr. Brick: Yes.

Trial Examiner Norwood: It is to strike Com-
38352 mission's Exhibit 562 from 12-Y to 13-P; is that right?

Mr. Brick: Well, to the last page, Judge, whatever it is.

Trial Examiner Norwood: Well, I think that is 13-P—from 12-Y to 13-P should be struck because it quotes there the cost of deliveries of cement.

Mr. MacIntyre: Well, if Your Honor please, they were not included in his motion. His motion went to Commission's Exhibit 562-12-Y to 13-J

Mr. Brick: No, I think my motion included that entire exhibit, Mr. MacIntyre.

Trial Examiner Norwood: Well, are those exhibits I handed you in the record now?

Mr. Brick: Yes, they are there as Commission's exhibits.

Mr. MacIntyre: Well, if Your Honor please, if there is a motion to strike Commission's Exhibit 562-13-K to 13-Q, it is not opposed, and we agree to the withdrawal of those particular pages.

Trial Examiner Norwood: Well, let the record show that they are withdrawn, and the motion is denied as to striking Commission's Exhibit 562-12-Y to 13-J, but their consideration will be confined to the evidence that there was a meeting, and so forth, and evidence of their conferences; and the report, and so forth.

38353 Mr. Brick: I do not understand what the "and so forth" means, Judge.

Trial Examiner Norwood: Well, you study about it.

Mr. Brick: As I see it, we still have in the record a report of a meeting, and the record shows it was called for the consideration of a report which the industry committee made to the T. V. A., and for the purpose of discussing certain statements which had been prepared by the T. V. A. and handed to the industry committee.

Trial Examiner Norwood: Well, it will make it a little clearer, but it will be considered for no other purpose than to establish the fact of the meeting and of the fact that they attended, and the subjects which they discussed. I think that covers it.

Mr. Brick: I know, Judge, but it is accepted for the purpose of showing that there was a meeting, and that they discussed certain subjects.

Trial Examiner Norwood: Yes.

Mr. Brick: Now, I am asking if the subject discussed was the report prepared by the industry committee, and that that report was—

Trial Examiner Norwood: It is reasonable to show that, but it is not reasonable to show what that report was, and it is immaterial as to what the report was. It is not relevant at all, and it is excluded. That is just where

38354 the lin. should be drawn.

Mr. MacIntyre: That is, the report is excluded. You do not mean the exhibit showing the minutes of the meeting.

Trial Examiner Norwood: The record is clear on it.

Mr. Brick: That is, Respondents' Exhibit, for identification, 2201-C through Z-71.

Trial Examiner Norwood: Proceed.

By Mr. Brick:

Q. Now, Mr. Browder, did you have any discussions about the rail rates which would be applicable in connection with the requirements of T. V. A. with any of the T. V. A. representatives?

A. Yes.

Q. And to whom did you talk on that subject?

A. Mr. L. B. Rockwell, the traffic supervisor, and Mr. C. H. Garity, the Director of Purchases.

Q. And what took place in connection with that discussion, Mr. Browder?

A. Well, I just explained to them that there was no foundations for the rates that they had shown, and that—

Trial Examiner Norwood: Now, this testimony here is on the same basis as that material we have excluded. Why can't Counsel rely on his exceptions and go on to another subject?

I am going to strike that answer on my own motion.

38355 Mr. Brick: I am sorry we can't be in accord on this, but we still have in the record the minutes of the meeting. Now, the subject which I am asking the witness to tell us about at the moment relates to the matters which were discussed at that meeting and to which some reference is made in the report. It is just another one of those situations where the Government only put in a small part of a given subject, and we do not know what use the Government is going to make of it, and Mr. Wooden has indicated today he will make any use of it he possibly can without any limitation. Now, we want to get in all of the facts, and that is all there is to the whole story.

Trial Examiner Norwood: Yes.

Mr. Brick: If we are to be deprived of that opportunity, why, to the extent that we are deprived of it we haven't an opportunity to meet the issues which are raised by the pleadings.

Trial Examiner Norwood: I think you can put in any evidence as to the meeting and as to what was discussed, but the discussions themselves are unimportant.

Mr. Brick: Well, that seems to leave the impression that when there is a meeting there is an assumption of

some kind of wrongdoing. That is the basis of the Government's case, and that is what we want to meet. If we cannot state the facts relating to the meetings, and what
38356 happened at the meetings, and what matters were discussed, how are we going to determine whether or not they are collusive or proper?

Trial Examiner Norwood: You can do that. I told you you could.

Mr. Brick: I can't see how we can do that and still abide by your rulings.

38357 Q. As a result of the discussion to which you made reference, Mr. Browder, did the T. V. A. revise the rail rate estimates which appeared on the estimates which it had prepared and shown to the industry committee?

A. Yes.

Q. And did they substitute the actual existing rail rates in all of the instances where they proposed to deliver by rail?

A. Yes.

38361 Q. Now, did you have any meeting with Mr. Chambers concerning barge rates on or about the middle of September?

A. Yes.

Q. That was in 1934, Mr. Browder?

A. That is correct.

Q. Was that meeting arranged by Dr. Morgan?

A. Either by Dr. Morgan or by Mr. Chambers at Dr. Morgan's request.

Q. And as you understood it, what was the purpose of that meeting?

38362 A. To see if Mr. Chambers and I could check out any differences we had in the basic data on which our barge rates were based.

Q. Mr. Browder, I show you Respondents' Exhibit 2917, for identification, and ask you what it is.

A. It is a Western Union telegram from Mr. W.
38363 R. Chambers, of the Tennessee Valley Authority, to Mr. Blaine Smith, dated September 13, 1934.

Q. And when did that first come to your attention?

A. At the time it was received in our office.

Q. Was the information conveyed in this telegram in any way related to the conference you had with Mr. Chambers to which you referred a short while ago?

A. Yes.

38365 Q. What was the first information you had, Mr. Browder, concerning the formula which was offered by Dr. Morgan?

A. On September 19th when I was in Mr. Chambers' office discussing with him the barge rates, Dr. Morgan sent this telegram to Mr. Blaine Smith and sent a copy of it to Mr. Chambers, who showed it to me.

Q. Now, was that the telegram to the effect that unless T. V. A. could get a price of $1.30 at the second closest mill it would build its own cement plant?

A. That is correct.

Q. Now, that related, did it not, the letting of October 15, 1934?

A. Yes. It related to any further letting of the T. V. A., but that was the time the next letting was held.

Q. And do you recall Penn-Dixie's bid on that letting?

38366 A. Yes.

Q. Did you participate in its preparation?

A. Yes.

Q. Mr. Browder, I show you Respondents' Exhibit 2918-A to Z-20, and ask you what it is.

A. This is our office copy of our bid as submitted to the T. V. A. on October 15, 1934.

Q. I think you stated that you participated in its preparation, did you not?

A. That is correct.

38367 (RESP. EX. 2918-A to 2918-Z-20 was offered and received in evidence.)

38373 By Mr. Brick:

38374 Q. Mr. Browder, I show you Commission's Exhibit 925-A-6 to D-6, and ask you if you received a copy of that document from the Code Authority?

A. Yes.

Q. What member of the industry filed the prices contained in that exhibit, Mr. Browder?

A. I filed them for the Penn-Dixie Company.

Q. I show you, Mr. Browder, Respondents' Exhibit 2919-A to D, and ask you what it is.

A. This is our office copy of the letter to Mr. B. H. Rader, chairman of the Code Authority, dated October 9, 1934, filing these prices for the T. V. A. with the Code Authority.

Q. Did you participate in the preparation of those prices?

A. Yes, sir.

38376 (RESP. EX. 2919-A to 2919-D was offered and received in evidence.)

By Mr. Brick:

Q. Now, who in your company, Mr. Browder, figured the prices which are contained in Respondents' Exhibit 2919-A through D?

A. I did.

Q. Mr. Browder, I show you Respondents' Exhibits 2920-A to C, for identification, and ask you what they are.

A. These are my work sheets on which I prepared the prices that were filed with the Code Authority for the T. V. A.

Q. Are these your personal work sheets?

A. That is right, in my own handwriting.

38377 Q. Did you prepare any of these prices in collaboration with any representative of any other cement companies?

A. No.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Browder, when was this tabulation made up?

A. I can't say the exact date, Mr. MacIntyre, but it was shortly before these prices were filed, and after September 19th, the date on which we received Dr. Morgan's telegram giving us his ultimatum.

Q. It was during the latter part of September or the early part of October, 1934?

A. That is right.

Q. And did you figure those prices shown on there in any different manner than the manner in which you testified that you figured prices heretofore on other projects?

A. Yes. They were figured on an entirely different basis on this project. I never figured on this basis before.

Q. That is, using base price plus freight? You never used that before?

38378 A. Oh, we have used the price base at mills plus freight in figuring, but not the second closest mill. This is figured in accordance with Dr. Morgan's formula of a base at the second closest mill.

(RESP. EX. 2920-A, 2920-B, and 2920-C was offered and received in evidence.)

Direct Examination by Mr. Brick (Resumed).

Q. Now, in connection with the prices that you filed, Mr. Browder, what procedure did you follow in figuring those prices?

38379 A. Well, I followed the procedure set down in Dr. Morgan's telegram to Mr. Blaine S. Smith, dated September 19, 1934, which was $1.30 at the second closest mill freightwise to the project.

38380 A. (Continuing) And that applies to the price basis we used.

Now, to the rail delivery points involved we used the land-grant rates which were in effect and which were furnished us by the T. V. A.

To the water delivery points we used land-grant rates where they were available up to the rail head on the river and barge rates which had been quoted us by the Cumberland River Sand Company of Nashville, Tenn., from the rail head to the dam site.

I might say that the rates we had secured from the Cumberland River Sand Company were the lowest barge rates we had been able to secure.

Trial Examiner Norwood: You figured the price on those barge rates, you say?

The Witness: The delivered price which we quoted the T. V. A. was predicated on those barge rates and

38381 land-grant rail rates and the formula of $1.30 at the second closest mill.

By Mr. Brick:

Q. And how did you figure the price at Aurora?

A. The price at Aurora was arbitrarily made the same as the price at Pickwick.

Q. And what was the reason for that?

A. Well, Dr.—the price based on Dr. Morgan's formula for Aurora would have made a higher price for that job than for the Pickwick job. However, we found, or we knew that the Marquette Cement Company had been making barge deliveries at the Wheeler Dam site for the locks there in their own barges for some time, and they passed right by the Aurora Dam site, and we did not feel it would be right and proper under those conditions to charge the T. V. A. a higher price at Aurora than it would be at Pickwick. So we arbitrarily reduced the Aurora price to the equivalent of the Pickwick price.

Q. How did you figure, Mr. Browder, the barge rates which appear on your work sheets?

A. They were quoted to us by the Cumberland River Sand Company of Nashville, Tenn.

38382 Q. I show you Respondents' Exhibit 2921-A to C, for identification, and ask you what that is, Mr. Browder.

A. This is a letter dated October 6, 1934, from the Cumberland River Sand Company of Nashville, Tenn., to the Penn-Dixie Cement Company, for any attention, and quotes us the barge rates for deliveries at the dam sites of the T.V.A. projects.

Q. What is the Cumberland River Sand Company?

A. Did you say what are they?

Q. Yes. Will you describe the nature of the company?

A. Well, they operate big sand and gravel plant at Nashville, Tenn., in the Cumberland River, and they own and operate quite a fleet of barges and tow boats, and they agreed to use those barges and tow boats in this T.V.A. service for those—at those rates shown in the letter.

Q. On 2921-B, there is a hand written note stating "Quoted by Coolidge to T.V.A. on October 15, 1934." Is that Mr. Coolidge who is referred to on 2921-A as the general manager?

A. That is right. Mr. Coolidge was in Knoxville on October 15, and in my presence quoted the T.V.A. that figure.

Q. And do you know the circumstances under which that handwritten note was made on 2921-B?

A. Yes; I wrote that on there at the time that that was done.

Q. And is that your handwriting?

A. That is my handwriting, yes.

Q. And what was your authority for understand-
38383 ing the quotation given by Mr. Coolidge to T.V.A.?

A. I was present when it was done.

Q. And further down on that page, Mr. Browder, I see pencil notations, the figures 24.7 and 24.5. Will you explain the significance of those, if you can?

A. That is a memorandum that I made on this letter, and which refers to telegrams we received on the dates mentioned from the Cumberland River Sand Company correcting the quotations made in this letter from 26.7, from Sheffield to the Pickwick Dam site, to 24.7, and cor-

recting the quotation of 17.5 from Danville, Tenn., to the Aurora Dam site, to 24.5.

Mr. Brick: I offer in evidence Respondents' Exhibit 2921-A to C (handing the document to Commission's Counsel).

Mr. MacIntyre: I would like to ask a voir dire question on this, if I may.

Trial Examiner Norwood: Go ahead.

Examination On Voir Dire by Mr. MacIntyre.

Q. Mr. Browder, were these rates quoted by this company to your company with the understanding that you would probably use them in connection with hauling cement yourself?

A. Yes.

Q. Did the T.V.A. haul the cement it purchased from you, or did you haul it?

A. We hauled it to all of the river projects 38384 where they requested delivered to the dam site.

We hauled it in hired barges. They hauled not a barrel of it.

Q. And you billed them for the delivered price?

A. That is right.

Q. Including the freight?

A. Including the freight and the barge freight.

Q. In that case how did the land-grant rate play any part in it? Was it on a Government bill of lading?

A. Yes.

Q. Over both the barge—

A. Oh, no, there was no land-grant rate on the barges, and there was no land-grant rate involved in these particular movements; but if the contract provided,—if a land-grant rate had been involved, it would have been employed.

Q. Now, let us see: Do I understand that the Government bill of lading on which you made shipments did not apply to the water shipment but did apply to the rail?

A. No, sir; we did not make any shipment on Government bills of lading to these water delivery points.

Q. In other words, the entire shipment, rail and water, was on a commercial bill of lading?

A. The water movement was on no bill of lading at all. It just moved on our own barges.

The rail—let me explain this, Mr. MacIntyre: The shipments moved from Richard City to Sheffield on a
38385 commercial bill of lading. We prepaid freight.

When it got to Sheffield we took delivery of the cement which was consigned—not consigned to the T.V.A. at that time—from the railroads, transferred it from cars to barges, and had it towed up the river, and delivered it right at the dam site to the T.V.A. There was no Government bill of lading involved in that movement at all.

Trial Examiner Norwood: Well, then, did you bill that to them according to the actual cost of the freight?

The Witness: We added on the actual cost, that is, the actual freight was added to $1.30 at the second closest mill, and that was the delivered price to the T.V.A. in accordance with our bid, our price filed with the Code Authority, and our invoices to the T.V.A.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. And there were no land-grant rates involved in conjunction with those barge rates?

A. Not from Sheffield to Wheeler and Pickwick, where they took delivery.

Q. But from your mill, I am talking about, Richard City—

A. That is right.

Q. —Kingsport?

A. No land-grant rate from Kingsport to Sheffield.

Q. And no shipments were made on a Govern-
38386 ment bill of lading?

A. No.

Q. Why was this quotation made to the T.V.A. as you noted on 2921-B if the T.V.A. was not to pay the bill?

A. The T.V.A. probably figured on doing this themselves, but they did not do it in the final outcome. They probably secured their own quotations. And I was present when they asked Mr. Coolidge for this rate, and he gave it to them, and I simply endorsed it on top of that letter.

Q. You had already received 2921, though, from the Cumberland Company, hadn't you?

A. That is right; yes, sir.

Q. You did not know when you received that whether or not you would utilize those rates, or whether T.V.A.

would make its shipment on its own bill of lading, or its own barges?

A. Not at the time the bids were taken, no.

We bid three different ways on these T.V.A. jobs so that T.V.A. could take any delivery they wanted:

We bid one price to them delivered at the dam site in our own barges.

We quoted them a price based on the lowest possible rate, land grant or otherwise, to the rail head on the river, so that they could put it on their own barges, if they wanted.

We quoted them, then, the nearest rail delivery point to the dam site to give them an opportunity of
38387 trucking it from that point to the dam site, if they so elected.

And they elected in these particular cases of Pickwick and Wheeler, which were the only jobs we furnished any water delivery on, to have us deliver it in our own barges to them.

Q. Now, referring to your handwritten note on Respondents' Exhibit, for identification, 2921-B, when you put that on there you did not know that you would utilize any of these rates, or whether T.V.A. had lower rates from some other barges for handling the cement?

A. No.

Q. You did not know that when you bid, did you?

A. No.

Q. You did not know whether or not they would utilize some lower barge rates and take the cement on a Government bill of lading at your mill, did you?

A. No. We did not know how they were going to take it.

Q. Yet you used this without that knowledge; is that correct?

A. No. I just said, Mr. MacIntyre, that we gave them the opportunity of taking delivery every way that we possibly knew how to give them. We gave them the privilege of us delivering to them at the dam sites; them taking it at the rail head on a Government bill of lading, if a land-grant rate was involved. We also gave them the benefit of taking it at the nearest rail point to the job site so they could truck it away.

38388 Q. Yes. I understood that explanation as you made it, Mr. Browder; a few moments ago, but what

I am attempting to ask you now is this: When you utilized these barge rates appearing in Respondents' Exhibit, for identification, 2921-A to C—

A. Yes.

Q. —you did not know whether or not they were the lowest rates that had been quoted to the T.V.A., or whether or not that your use of them in connection with your use of your bid would be acceptable to the T.V.A.?

A. No. We did not know whether they were going to build the cement plant at that time.

(RESP. EX. 2921-A, 2921-B, and 2921-C was offered and received in evidence.)

Direct Examination by Mr. Brick (Resumed).

Q. I am not sure whether you have testified whether or not, Mr. Browder, the rates appearing in Respondents' Exhibit 2921-A through C are rates you used in making up the prices which you bid, and which appear in Respondents', Exhibit 2919-A through D, and your work sheets, being Respondents' Exhibit 2920-A through C.

A. These rates were used—these rates, I should say, with the corrections which we later received through the mail, were used in basing our prices as shown in that filing with the Code Authority and in our bid to the T.V.A.

Q. And those are the exhibits to which I have made reference, are they not?

A. That is right.

Q. Now, it appears, Mr. Browder, that the prices indicated in your filing with the Code Authority are 10 cents higher than the prices appearing on the work sheets, Respondents' Exhibit 2920-A through C. Will you explain the reason for those differences?

A. Yes. The prices shown on the work sheets, which is Exhibit 2920-A to C, are net prices, and the prices shown in the Code filing, 2919-A, are the gross prices, which include the 10-cent cash discount. In other words, the 10-cent cash discount was added to the work sheet in filing our prices with the Code Authority.

Q. Now, in connection with the prices to Pickwick, it appears that the price per barge delivery appearing on the work sheets is two cents higher than the prices which

you filed with the Code Authority. Will you explain
38390 the reason for this difference?

A. Yes. That was the correction in the rate which we secured from the Cumberland River Sand Company in their telegram of October 9.

Q. And how did that change affect the price?

A. It reduced the price by the same two cents that the barge rate was lowered.

Trial Examiner Norwood: Now, you had those reduced prices in time to figure out and include them in your bid, did you?

The Witness: Oh, yes. We had them in time for the filing with the Code Authority.

Trial Examiner Norwood: And how long before the bid did you file them with the Code Authority?

The Witness: I believe we filed them with the Code Authority on October 9, and the letting was on the 15th, October 15, 1934.

Trial Examiner Norwood: And did the other competitors meet that price?

The Witness: Yes. They met that price.

Trial Examiner Norwood: The price you figured out was the contract price?

The Witness: Yes, sir. That was the price we filed with the Code Authority and the other companies accepted that filing and met that price.

38391 By Mr. Brick:

Q. Now, referring to your work sheets again, Mr. Browder, in connection with the land-grant rates which you used in developing the prices appearing on those work sheets, and in the Code filing, what was the source of your information with respect to those land-grant rates?

A. These land-grant rates were furnished to us by the Tennessee Valley Authority.

Q. Who was it connected with the Tennessee Valley Authority furnished you those rates?

A. They were generally furnished to us by Mr. L. B. Rockwell, who was traffic supervisor, sometimes by Mr. Garity, who is Director of Purchases, I think in this particular case they were furnished to us by Mr. Garity.

Q. Mr. Browder, did you file a so-called control clause in connection with any of these prices to T.V.A.? I refer to prices which are included in your work sheets and in your Code filings.

A. The T.V.A.'s complete invitation to bid, was filed as a part of the Code filing, and in the invitation to bid there is a paragraph which is somewhat similar to the control clause, and gives the T.V.A. the opportunity of taking advantage of the land-grant rates by accepting the title to the property at our mill, so it is in the nature of a control clause, but not the control clause that has
38392 been heretofore discussed.

Q. Well, now, that clause, then, appeared in the invitation, itself?

A. That is correct.

38393 Q. Mr. Browder, in figuring prices which you filed and bid, did you at any time consider quoting prices which were lower than those which could be calculated from the price formula laid down by Dr. Morgan?

A. No.

Q. Why not?

A. We never considered anything any lower than that.

Q. Why?

A. Well, we figured that was lower than any price that we wanted to voluntarily quote, but that we had to quote at least that figure to prevent the building of the mill, and we decided to do it hoping that we would
38394 thereby secure a large quantity of the cement, bring up the operation of our mills in the South which were down at a pretty low level at that time, and possibly break even on it, but at least reduce the manufacturing cost and overhead on our per barrel cost of manufacturing.

Q. Was Penn-Dixie awarded any of the business on this letting?

A. Yes. We were awarded about 1,400,000 barrels.

Q. And from how many mills did you make shipments?

A. We made shipments of practically the entire amount from our Richard City mill. We have made one small shipment, I believe, of 55,000 barrels, from our Kingsport mill.

Q. I show you, Mr. Browder, Respondents' Exhibit 2922-A to Z-3, and ask you what it is?

A. This is our office copy of our contracts that was entered into with the T.V.A. on October 22, 1934, in accordance with our bid that had been submitted to them on October 15th.

38396 Q. Now, you have testified, Mr. Browder, that you bid several types of prices in connection with

these T.V.A. requirements. Now, what types of those prices were included in the contract into which your company and the Tennessee Valley Authority entered?

A. All of the types were included in the contract to give the T.V.A. the opportunity of selecting whichever one they desired, and they only make the selection just before the movement is ready to begin.

Trial Examiner Norwood: Well, now, was that pursuant to terms filed with the Code?

The Witness: Yes, sir; it was all filed with the Code.

Trial Examiner Norwood: And was that pursuant to the same terms that were filed in the bids of your competitors?

The Witness: I do not know that I exactly understand, Judge, but that contract is based on the terms and
38397 prices of our bid, and our bid was based on the terms and conditions of our filing with the Code Authority, and the other companies met those prices and their bids were similar.

38402 Q. Now, your bid refers to Clinchfield, Mr. Browder, as a shipping point. Have any of your shipments been made from Clinchfield?

A. No.

Q. And why did Penn-Dixie make reference to Clinchfield in its bid?

A. Well, in our bid we showed Clinchfield as a possible point of origin to show that we could take care of, under all conditions, the entire requirements of the T.V.A. for which we bid; that if there was a breakdown, or simultaneous breakdown of plants at Richard City and Kingsport we would still have the Clinchfield mill to fall back on until such time as those difficulties could be overcome.

38403 Washington, D. C.,
Wednesday, May 15, 1940.

38404 D. S. BROWDER thereupon resumed the stand and testified further as follows:

38405 By Mr. Brick:

Q. Mr. Browder, calling your attention again to your filing of prices with the Code Authority under your bid to the T.V.A., all in connection with the letting of October 15, 1934, there appears to be certain conditions concerning your prices and a proviso that your price on business which might be awarded to your company would be no greater than prices of any other contractor on the same job, as that price might be affected by the operation of a price adjustment provision, section 24 of the contract form. Do you recall that?

A. Yes.

Q. Now, why did you include that provision in your bid?

A. Well, at the time that this bid was being taken we learned that the Tennessee Valley Authority was then negotiating for the purchase of the Power Company in Knoxville, which was furnishing power to the Volunteer Cement Company, and under the T.V.A. scales of rates the Volunteer Cement Company would have had a material reduction in their power rate, which, under section 24 of the contract, would have reduced their price to the T.V.A. by the same amount.

38406 Now, we felt that with that situation staring us in the face we would not receive as full an allocation when the awards were made if we did not meet that competitive condition from the Knoxville mills, so we therefore added that clause to our contract providing that if there was any reduction in their bid price under section 24 we would meet that reduction.

Q. Mr. Browder, did you, or, to your knowledge, anyone connected with your company, have any discussions with representatives of any other cement companies concerning that provision?

A. No.

Q. Did the Tennessee Valley Authority request that provision be included in your bid?

A. No.

Q. Now, as the result of the application of that provision in your bid, has your company had any occasion to revise any of the prices included in the contract which your company entered into with the T.V.A.?

A. Yes; we revised the prices on the Hiawassee Dam by making a reduction of .06753 cents. In other words, it was six—practically six and three-fourths cents in our price, and that reduction, that same reduction, is also applied on all the shipments made so far on the Watts Bar Dam, which is the old White Creek project, referred
38407 to in the contract. Those are the only two projects on which Volunteer received an award on which we have been making shipments since they received that reduction in their manufacturing cost by the power reduction.

Q. When, Mr. Browder, were those reductions effected?

38409 A. As I recall it now, the reduction in the Volunteer price under section 24 became effective some time in 1935. However, it did not affect us any until we started to ship on the Hiawassee Dam in 1937, I believe that was. In other words, the Volunteer was not shipping on any project that we were shipping on and therefore we did not have to make a reduction. I think we started a project that they also had an allocation on, and that was the Hiawassee Dam. The first shipments, I believe, were made in 1937.

Trial Examiner Norwood: Prior to that time, then, you had a higher price than they had; did you?

The Witness: No, they did not have any price at all, Judge, on these projects that we had.

By Mr. Brick:

38410 Q. Now, will you explain, Mr. Browder, the circumstances, in so far as you understand them, which led to the T.V.A. obtaining a better than its original contract price from the Volunteer Company?

A. At the time the invitation for the bids was being drawn up by the T.V.A. for this cement which was to move over a five-year period, which was generally longer than cement contracts were made for, the section 24 was put

into the invitation to bid and made a part of the bid to take care of any increase in manufacturing costs for account of the manufacturers, and any decrease in manufacturing costs on account of the T.V.A., to favor the T.V.A. In other words, it was mainly put in to take care of any inflation that might occur during this five-year period, but it was also to give the T.V.A. the advantage of any reduction which might be made in the various manufacturing costs.

Q. In order to be competitive with the Volunteer Company, was it necessary for you to include the same kind of a provision relating to the reductions on power rates.

A. Oh, that was part of the bid, yes; that was
38411 printed in the bid and was a part of it.

Q. Mr. Browder, has any occasion arisen where Penn-Dixie would have been entitled to raise any of its prices under section 24 of the contract?

A. Yes.

Q. What was the occasion, or what were the occasions?

Trial Examiner Norwood: The objection is overruled.

A. I believe it was in 1935 or in 1936, we had considerable increase in our labor costs and in our fuel costs
38412 and under section 24 of the contract we would have been permitted to increase our prices to the T.V.A. by the amount of those increases in coal costs and power costs as set forth in section 24, but in view of the other provision which we had put in we could not take advantage of that due to the fact that other companies did not have similar increases.

Q. Mr. Browder, has the Tennessee Valley Authority requested any extensions of the contracts into which it entered with your company?

A. Yes. The T.V.A. contract, as written, expired December 31, 1940. At the present time they are now engaged in constructing the Watts Bar Dam, which is referred to in the contract as White Creek, which will require approximately 780,000 barrels. A short while ago,—I think about 60 days ago,—we received a letter from the T.V.A. advising us that they would only be able to use about 225,000 barrels during the balance of this year on the Watts Bar Dam, and asking us to extend our contract to enable them to complete that job under the terms of this contract.

38413 Q. Has your company, Mr. Browder, made any decision with respect to whether or not it would grant the requests of the T.V.A.?

A. Yes.

Q. What was the decision?

A. We have, at the request of the T.V.A., ex-
38414 tended the contract with a supplemental agreement to cover the completion of the Watts Bar project.

38417 Q. Mr. Browder, I show you Commission's Exhibits 883-J to O, Q to T, V, and Y to 2-I, and ask you if you recall the correspondence included in those marked exhibits?

A. Yes.

Q. Did the Dixie-Dixie Company furnish cement to the Chicamauga Dam project, to the T.V.A.?

A. Yes; we furnished part of the requirements for the job.

Q. Were any freight rate difficulties encountered in connection with the shipment of that cement?

A. Yes.

Q. Under what circumstances did those difficulties arise?

A. Those difficulties arose—

38418 Trial Examiner Norwood: What was the nature of the difficulties, or what was the difficulty?

The Witness: The difficulty was that at the Chicamauga Dam there was a switching charge of $10 from Chattanooga to the site of the work, which applied to every car, regardless of the size of the car. In other words, it was a flat charge, and that affected the land-grant rate. It resulted in a different land-grant rate being applicable to every different car that was shipped. In other words, if there were 221 barrels in one car, you had one land-grant rate, and if there were 222 barrels in another car, you had another land-grant rate. In other words, we had to figure out the land-grant rate on every separate car before we could invoice the T. V. A. or receive payment on it, and we had to check with them, and that was the difficulty—these different land-grant rates for the different sized cars.

By Mr. Brick:

Q. Now, what was it that gave rise to that situation, Mr. Browder?

A. It was the fact that the switching charge from Chattanooga to the site of the work, called the Chattanooga Dam sitling. That was deducted from the through rate before the land-grant percentages could be applied.

Q. Was any action taken, that you know of, to
38419 overcome any of those difficulties?

A. Yes.

Q. What action was taken?

A. Well, I was in Knoxville about that time, and Mr. L. B. Rockwell, the traffic supervisor of the T. V. A., called this matter to my attention and said it was giving them considerable trouble, and asked if I could make any suggestions as to how the situation could be worked out, so that we would have a uniform price for every car, instead of a different price for every car, and I checked into it with him, with the figures that he had there, for a considerable length of time, and I could not figure any way that it could be worked out, and I suggested to Mr. Rockwell that the only relief I saw was to take the cars which we were shipping, and arrive at the average sized car, and then use the rates and prices we got on the average sized car to apply to the whole movement, and Mr. Rockwell suggested that that would be the only feasible way to work it out, and asked me if I would—

A. (Continuing) —and asked me if I would take it up with the representatives of the other companies to find out if they would be willing to make such an arrangement, and asked me to take it up with my company and see if
38420 we would be willing to make such an arrangement.

Q. Pursuant to request of Mr. Rockwell, did you take up that matter with any of the other cement companies?

A. Yes, I took it up with the other cement companies and with my own company.

Q. Will you state how you proceeded in that manner?

A. I wrote a letter to the traffic representatives of each of the cement companies who had allocation on the Chickamauga Dam and advised them of my conversation with Mr. Rockwell and asked if they would be willing to use this average per car.

Q. Did you get any replies from the other cement companies?

A. Yes. They all replied.

38421 Q. Did Mr. Rockwell independently try to work out any formula?

A. Yes. Mr. Rockwell advised me just about the time I got the replies back from the other companies that he had worked out a formula that would produce the desired result without using the average car.

By Mr. Brick:

Q. And did you test his formula?

A. Yes, I tested his formula for various sized cars, made any number of calculations, and found that it worked.

Q. Did you have any discussion with Mr. Rockwell concerning the formula which he had worked out?

A. Yes. I advised Mr. Rockwell that I had tested out this formula and found out that it worked, that I at that time did not know why it worked; but that it did on every sized car that I tried out; it came out to the exact same cent per car as if you worked the land-grant rates out on that particular sized car.

38424 Q. Did Mr. Rockwell request you to bring the formula which he developed to the attention of the other cement manufacturers, Mr. Browder?

A. Yes, he did. He requested me to abandon the handling of the average car arrangement and take up this new formula with the other representatives.

Q. What was the result of the request that you made?

A. I took it up in the same way with the other cement companies; and they all came back and approved its use.

Q. After that stage, was it used in connection with shipments?

A. Yes, it was used on all of the shipments for the Chickamauga Dam.

Q. Now, when I started this subject I referred you to some exhibits, some of which were written by you and some of which were addressed to you. Now, are these papers which passed through your hands in connection with this situation which was developed by Mr. Rockwell?

A. Yes.

38425 Q. Mr. Browder, I show you Respondents' Exhibit, for identification, 2923-A to H, and ask you what those papers are?

A. These papers are original letters and my office copies of letters written by me or received by me in connection with this land-grant situation to the Chickamauga Dam.

Q. Mr. Browder, do those papers relate to the same general situation as the papers included in Commission's Exhibit 883, or at least those parts of it to which I brought your attention?

A. Yes.

Mr. Brick: I offer Respondents' Exhibit 2923-A to H in evidence (handing the documents to Mr. MacIntyre).

Mr. MacIntyre: I would like to ask the witness a question on voir dire.

Trial Examiner Norwood: Proceed.

Examination on Voir Dire by Mr. MacIntyre.

Q. Mr. Browder, would you tell us anything that you noted in this pending offer that explains anything in this situation that is not explained in the exhibits now in the record or in your testimony already given?

A. I will have to check through them, Mr. MacIntyre, to be sure.

38426 Q. Have you not seen them before appearing on the stand to testify, to determine what is in the documents?

A. It has been a good long time since I have seen them. This one is not in this one, and I would have to check them.

Q. You have not compared them recently to determine that?

A. No.

Q. Well, we will not take the time here to determine that. I thought you had.

A. No, I have not.

Mr. Brick: Does Counsel withdraw his question?

Mr. MacIntyre: I said I did not want to take the time in the courtroom to get an answer.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: I would like to ask one further question on voir dire.

By Mr. MacIntyre:

Q. Referring to Respondents' Exhibit 2923-H, can you tell us what became of the original of that letter, Mr. Browder?

A. No; I can't say right now what did become of the original of that.

Q. Did you send it to one of your competitors?

A. No.

Q. Why did you not submit it to the Commission under the subpoena duces tecum, calling for that letter?

A. That may be where it is.

38427 Q. No, you submitted that one which has the identification mark on it; you submitted that one as a copy.

A. As I say, I don't know. I have no idea now where it is.

Q. Did you go into your files for these papers when that subpoena was sent to your company?

Mr. Brick: You received a great many duplicates, Mr. Browder.

Mr. MacIntyre: I am trying to get some facts from the witness now.

By Mr. MacIntyre:

Q. You say you did take it from your files?

A. This came from my files; yes.

Q. But you do not know what became of the original?

A. Right now I do not. I know I did not send it to any competitor.

Q. You know that, but you do not know what became of it?

A. No; I don't know where it is, but I did not send that to any competitor.

38428 (RESP. EX. 2923-A to 2923-H, was offered and received in evidence.)

Direct Examination (Resumed) by Mr. Brick.

Q. Now, Mr. Browder, in the course of one of Mr. MacIntyre's voir dire examinations, I believe you stated that in connection with shipments made by your company on some of the T. V. A. contracts, there were land-grant rates involved; is that correct?

A. No; there were no land-grant rates involved on shipments from the Penn-Dixie mill to the T. V. A. projects. I did not intend to answer that way. As I recall, the only question of land-grant rates was in connection with 38429 my work sheet. There were some land-grant rates on that from other points.

Q. And are those the work sheets which you identified yesterday as Respondents' Exhibit 2920?

A. Yes, sir.

Q. That is, 2920-A to C?

A. That is right.

Q. Where did you get your land-grant rate information, Mr. Browder, which you used in connection with those work sheets and the prices which you developed on the sheets?

A. It was furnished to me by the representative of the T. V. A.

Q. And who was he?

A. Mr. L. B. Rockwell.

Q. Mr. Browder, do you know whether or not the Penn-Dixie Company received the invitation for proposals on cement which were issued on March 30, 1938, by the Procurement Division?

A. Yes.

Q. Did your company, the Pennsylvania-Dixie Company, submit a bid?

A. No.

38430 Q. Well, did your company write any letter to the Procurement Division in which they stated any reasons as to why they did not bid?

A. No; we just simply did not bid.

Q. And did you discuss the matter with the officials of your company?

A. Yes.

Q. In the general routine of your business, do
38431 you participate in decisions as to whether or not your company will bid on Government lettings?

A. Yes.

Q. Who prepares the prices which your company submits in connection with Government bids?

A. Many times I do. Sometimes it is done by others in the organization.

Trial Examiner Norwood: He can tell us his reasons for his opinion in the matter.

A. The bids were so indefinite, in view of the fact that they showed no fixed amounts or quantities of cement that would be required, the points of destination or territories
in which they would be used, or the time in which the
38432 shipments would be made, that we felt that we could not operate our mills under those conditions, with a contract of that kind.

By Mr. Brick:

Q. Did your associates in the Penn-Dixie Company, express any views different from the reasons which you have stated, Mr. Browder?

A. No.

Q. Did they express views which were consistent with those you have expressed here?

A. Yes.

Q. Did you or any of the officials of your company, to

your knowledge, discuss this invitation with any of the representatives of your competitor companies?

Q. Mr. Browder, in connection with your decision not to submit a bid in response to the invitation of the Procurement Division, did you or did you not take into consideration what your competitors might do in connection with that invitation?

38433 A. No, we simply did not want the business on that basis.

Q. Now, after the March 30, 1938, Procurement Division invitation, did you receive some other invitations to bid f.o.b. mill in various districts?

A. Yes.

Q. Did your bid on those invitations?

A. No, we did not bid on those.

Q. Why did you decline to bid?

A. For practically the same reasons we did not bid on the others. Those bids, as I recall, did show some definite quantities, but no time of shipments or no destinations. They were of such an indefinite nature that we did not bid.

Q. Now, from your experience, Mr. Browder, can you state whether or not it was usual for the United States Government departments to confine invitations to f.o.b. mill prices, as was done in connection with these Procurement Division inquiries?

38434 A. Well, most of the Government bids that we secured asked for a delivered price and sometimes a mill price; sometimes they only asked for a destination price.

By Mr. Brick:

Q. And for how long had that been the practice of the Government?

A. Oh, as far back as I have had anything to do with bids for the Government, which is about 17 years.

Q. Now, Mr. Browder, prior to these particular Procurement Division invitations, had the Government at any time in your experience requested f.o.b. mill bids where the land-grant rates were not involved?

A. Not generally; I could not say that it was never done, though, but not generally.

Q. Do you recall any time when they did?

A. No, I do not recall any time.

Q. Now, in the cases, Mr. Browder, where the Govern-

ment asked for f.o.b. mill bids in order to take advantage of the land-grant rates or special freight rates, has
38435 the Penn-Dixie Company quoted in that manner?

A. Yes; we have always quoted so as to give the Government the benefit of the land-grant rates.

Q. And does that apply also to any special rates which might have been given to the Federal Government?

A. Yes.

Q. Now, Mr. Browder, I want to direct your attention to land-grant rates. Has it been your experience that applicable land-grant rates are difficult to determine?

A. Yes.

Q. How do you obtain those rates?

A. Why, we obtain them in several different ways. We have had invitations to bid from the Government that contained the land-grant rates; we have secured them from the tabulation of Government bids on previous lettings, and we have secured them from the railroads, and upon occasions we have figured them ourselves.

Q. Has it or has it not been your experience that the land-grant rates you obtained from the railroads are correct?

A. I cannot say whether they are correct or not. They are not generally the same as the land-grant rates that we finally secure from the Government tabulation of bids.

Q. Well, what do you mean when you say you cannot determine whether they are correct?

A. We have no way of verifying which rate is
38436 correct, whether the Government rate is correct or the railroad rate is correct, but the Government rate is the rate that is generally protected on the shipment.

Trial Examiner Norwood: The Government rate is the one that they award the bids by; is that it?

The Witness: That is correct; yes, sir.

By Mr. Brick:

Q. Will you explain the circumstances, Mr. Browder, which caused the different results in the calculations of these land-grant rates which are calculated by the railroads on the one hand and the Government on the other?

38437 A. The difficulty lies in two different factors. One is the difference in the division of the rates, which is sometimes not agreed upon by the railroads in-

volved, and in those cases each railroad would figure the land-grant rate based on the division which they would assume to be correct. In that case I understand where there is a difference in the divisional factors, then the land-grant rates are figured on the mileages involved rather than on either of those divisions. The other factor which results in different rates is in the dropping of fractions in
38438 your calculations. There is quite a lot of calculation involved in figuring a land-grant rate, and if you hold all of your fractions out to the last decimal place you get one answer; if you drop everything from the fourth decimal place, you get another answer, and if you drop everything after the sixth decimal place, you get still a different answer. So that accounts for the difference in these land-grant rates.

By Mr. Brick:

Q. Will you explain what you mean by the difference in the divisions? What is the technical explanation of the word "divisions"?

A. That is a proportion of a through rate that involves a haul over two or more lines, that each of those lines secures.

Q. Now, in connection with the differences resulting from the fractions, Mr. Browder, are those differences substantial in dollars and cents, or do they relate to mills and fractions of a cent?

A. They are very slight.

Q. To what extent is it possible for you to rely on the land-grant rate figures the Government uses in making its awards?

A. Well, we rely on those figures we get from the tabulation of previous bids, but occasionally we find that the Government itself uses land-grant rates on one bid that they have not used on previous bids; so we do rely on them until we get a new rate from the Government.

38439 Q. Now, to what extent, if any, Mr. Browder, have you exchanged information with competitors in regard to land-grant rates which might be applicable in pending Government lettings?

A. Not at all. We depend on the information we get from the other sources I mentioned.

Q. How do you bill and invoice shipments on sales to the Government where land-grant rates are involved?

A. We invoice them and bill them at a price f.o.b. our mill, so that they can take title to the property at the mill and secure the benefit of any special or land-grant rate that might be involved.

Trial Examiner Norwood: By that do you mean you do that now, or when did you do that?

The Witness: We have always done that.

38441 By Mr. Brick:

Q. Prior to the N. R. A. Code for the Cement Industry, Mr. Browder, how did the Penn-Dixie Company quote to the United States Government?

A. We quoted them our commercial destination price and also quoted them f.o.b. our mill.

Q. And for how long did Penn-Dixie continue to quote the Government in that manner?

A. As long as I was with the company, at least.

Q. Did you change your practice during the Code in connection with the so-called control clause?

A. Yes.

Trial Examiner Norwood: When you quote f.o.b. mill, was that your base price or was it a price derived from the destination price, and the deduction of freight?

The Witness: Judge, it—

Mr. Brick: Pardon me.

Is this prior to the Code or during the Code, Judge? I think there will be a difference.

Trial Examiner Norwood: Any time. He may tell us that.

38442 The Witness: It was to meet the competitive conditions at destination as we understood them to be, and it sometimes might be our price base that we would quote, or it might be considerably lower than that depending on the competitive conditions at destination and what the land-grant rate or freight rate from other mills might be.

Trial Examiner Norwood: You made them f.o.b. mill after taking the destination prices into consideration?

The Witness: Not necessarily the destination, commercial destination price, but what our competitors might quote at their mills, and by calculating the difference in our rate and their rate we would probably subtract an additional amount from our price base to get at what we would quote to the Government.

By Mr. Brick:

Q. Now, what change, if any, did you make in your policy as to quoting the Government during the N. R. A. period?

A. When the destination cost basis was filed by one of our competitors with the Code Authority, and that destination cost basis included also the so-called control clause, we met those Code filings and quoted the Government in the same way.

Q. How did that control clause operate, Mr. Browder?

A. Well, it permitted the Government to deduct from our quoted destination cost to the Government the land-grant rate, special rate, or commercial rate, which-
8443 ever it was lower, and to use that figure or use the resulting figure as a price at our mill for invoicing and making shipments.

Q. Why did you follow the price filing of a competitor which was filed with the N. R. A. Code—may I withdraw that question, please.

Why did you follow the provision concerning the control clause, which you stated you found in the price filing of a competitor during the Code period?

A. Well, there are two reasons for that; One was if we quoted at all we had to follow the price filing that was previously filed or make a new filing of our own for that particular project. This initial project,—I do not recall what it was at this time,—but our decision was to follow the Code filing which we felt did give the Government the benefit of the land-grant rates and would enable us to meet the competition of other producing companies on that particular work.

Q. Was it the practice during the N. R. A. period for the Code Authority to send to you all price filings for your competitive areas?

A. Yes.

Q. And was it such notification by the Code Authority which brought the control clause to your attention for the first time?

A. That is correct.

Q. Did you continue to use the control clause
8444 after the Code period?

A. Yes.

Q. And were there times after the Code period when you did not use it?

A. Yes.

Q. Did you have any agreement or understanding with any of your competitors concerning the use or non-use of the control clause in connection with any work which was solicited by the Federal Government?

A. No.

Q. Now, Mr. Browder, in figuring bids where land-grant rates were involved, how has the Penn-Dixie Company handled the fractions involved in the figuring?

A. Why, at different times we have handled that in different ways. We have at times retained all of the fractions; at times we have dropped all fractions beyond the fourth decimal place or the fifth decimal place, and we have also dropped at the present time, and for some time past, dropped all fractions and quoted just in dollars and cents.

Q. And what were the circumstances which led you to add or to drop fractions?

A. Well, in the case of dropping all the fractions there we found that some of our competitors were dropping all fractions, and in the next letting we had we dropped all fractions and continued to do that.

38445 Q. Under what circumstances did you find that your competitors were dropping fractions?

A. At the opening of one of the Government bids we found, when the bids were tabulated, that all the fractions had been dropped by some of our competitors.

Trial Examiner Norwood: In that case, did you lose the award?

The Witness: We lost the business where our competitor dropped the fractions and we did not, and we dropped them after that to be competitive.

The witness identified Resp. Ex. 2924 A to I as "our" office copy of bids taken by the Quarter Master at Fort Oglethorpe, Georgia, on March 5, 1937 and February 11, 1937, together with the covering letter and letters 38446 from "our" district office to the New York office concerning these lettings. The witness further identified Resp. Ex. 2924 A as being a paper conveying information in connection with which the witness took action. When "we" received this paper showing that the Signal Mountain Portland Cement Company had entered their bid, "we" issued instructions to meet this competition by Signal Mountain in dropping fractions.

Mr. Brick: I offer Respondents' Exhibit 2924-A to I

(handing the documents to Counsel for the Commission).

38447 Mr. MacIntyre: We object to Respondents' Exhibit 2924-A as being incompetent, irrelevant, and immaterial.

It is hearsay. The writer of it is not called, so that we may cross-examine him as to the circumstances under which this information, if it did come to his attention, came to him, and as to the accuracy of it.

Mr. Brick: I am offering it to corroborate the witness' testimony that he changed his policy, and in cor-
38448 roboration of his testimony that he relied on the information in this paper in connection with the action which he took. Now, as to the Commission's technical objection on its competency, I do not think that is directly in point, because we are not offering it to prove the truth of the contents. We are offering it to show what the witness acted on in changing his policy.

Trial Examiner Norwood: I shall sustain the objection. I think it is entirely unnecessary as corroborative matter.

Trial Examiner Norwood: Well, you have gone into it already, and covered it. He has told us about his competitor dropping the fractions, and he has told us the circumstances. I do not think it is necessary to receive anything further on that.

The objection is sustained.

Mr. MacIntyre: Now, if Your Honor please, we object to the offer of Respondent's Exhibit 2924-B to I, on the ground that they are irrelevant and immaterial detail.

38449 Trial Examiner Norwood: I will sustain the objection to all of them.

By Mr. Brick:

Q. Now, Mr. Browder, do you recall Mr. John Duffy visiting the Pennsylvania-Dixie offices during the summer of 1931?

A. Yes.

Q. Who was Mr. John Duffy?

38450 A. He is vice-president of the Lehigh Valley Railroad.

Q. Did you have any discussion with him on that occasion?

A. Yes.

Q. What was the discussion?

A. The discussion was the business which the railroads were losing to trucks.

Q. Did he make any proposals to you?

A. No; no definite proposals of any kind.

Q. Well, what did Mr. Duffy say in the course of that discussion?

A. Well, after discussing it with me, and stating their desire to regain this business from the trucks, he said he would like to discuss the matter with Mr. Blain S. Smith, our president.

Q. Did he discuss the situation with you before talking to Mr. Smith?

A. Yes, sir.

Q. And will you relate that discussion; that is, the one between you and Mr. Duffy?

A. Yes. They—it was not a very long discussion. When he came in he stated that they were losing a considerable amount of traffic to the trucks which they badly needed at that time, and that they were anxious to have us forward as much traffic as we could by the rails.

Q. Did you have anything to say to him at that time?

88451 A. Why, in the general conversation I told him, of course, that we were very friendly with the rails and give them lots of our business, there was certain business which we had, due to competitive reasons, to forward by trucks.

Q. Did Mr. Duffy make any other visit during 1931?

A. Except the visit with Mr. Smith.

Q. Yes; but I mean was he at your offices?

A. No.

Q. At any time?

A. No.

Q. So he was at your office once and you are now telling us what happened at the time he called?

A. That is right.

Q. And under what circumstances did Mr. Smith enter into the discussion?

A. Well, Mr. Duffy said that he would like to also discuss the matter with Mr. Smith, and I called Mr. Smith on the phone and told him Mr. Duffy was in my office and would like to speak to him, and he said I should bring him into his office, which I did. I took Mr. Duffy into Mr. Smith's office, and Mr. Duffy talked to Mr. Smith just

along the same lines he talked to me, practically repeated his conversation with me, to a great extent.

Q. What, if anything, did Mr. Smith have to say to him?

Mr. MacIntyre: Now, just a minute. I object to 38452 calling for incompetent and hearsay testimony.

Mr. Brick: I do not appreciate the hearsay feature of it.

Mr. MacIntyre: It is asking this man to tell what Mr. Smith told Mr. Duffy.

Mr. Brick: In his presence, certainly.

Trial Examiner Norwood: This is going to whether or not there was a conspiracy as between these people.

Mr. MacIntyre: Yes; that is true, Your Honor.

Trial Examiner Norwood: The objection is overruled.

Mr. Brick: Will the Reporter read the question, please.

Trial Examiner Norwood: He is not trying to bring this out to prove the truth of what Mr. Smith said. It is the fact that he said it or did not say it that is important. Go ahead.

Mr. Brick: Will the Reporter read the question, please?

Trial Examiner Norwood: Read the question.

(Question read.)

A. Mr. Smith told Mr. Duffy that our mills were not properly equipped to service trucks, and that they were—created an additional hazard, they interrupted our carload movement, and that there was an additional expense.

38453 Trial Examiner Norwood: Now, I do not think that you can go into that. That is factual matter. You may tell what Mr. Smith said with relation to some agreement.

Mr. Brick: No, if Your Honor please, that is not my question. My question is what did Mr. Smith say in the presence of this witness in the course of the conversation among the witness, Mr. Smith, and Mr. Duffy. I want to know what happened, what words were stated and expressed at that discussion.

Trial Examiner Norwood: I do not think you can bring out the factual matter about this trucking.

Mr. Brick: It is only the fact as to what was stated; that is all I am looking for.

Trial Examiner Norwood: Go ahead.

Mr. Brick: Will you continue?

The Witness: Am I to answer that?

Trial Examiner Norwood: Go ahead; yes.

By Mr. Brick:

Q. Will you continue with your answer?

A. How far had I gotten?

Mr. Brick: Will the Reporter read the answer as far as the witness has gotten?

Trial Examiner Norwood: Read the answer.

(Answer read.)

Trial Examiner Norwood: I think that I will
38454 strike that on my own motion. You may tell any conversation Mr. Smith had with respect to any agreement or the absence of any agreement.

We have had an abundance as to reasons for people not trucking, so much that we are excluding it from here on even when it is offered as direct evidence.

Mr. Brick: Well, Your Honor may not appreciate the full significance of some of the exhibits which are now in the record. I would like to point out that Commission's—

Mr. MacIntyre: Just a minute.

Trial Examiner Norwood: Wait a minute. Let the Counsel finish.

Mr. MacIntyre: I object to his—well, if Your Honor please, I object to Counsel reading in the presence of this witness what is in that document. He can show it to you if he wants you to know what is in it.

Trial Examiner Norwood: Show it to me.

Mr. Brick: You can rely on Counsel, Mr. MacIntyre, not indulging in anything that will be improper.

I would like to bring to Your Honor's attention that Commission's Exhibit 1145 relates to a meeting between Mr. Duffy and Mr. Smith, and that that letter contains a characterization on the part of Mr. Duffy as to what happened. Now, following the practice which Your Honor imposed on us of not showing exhibits to witnesses
38455 even though they were received as admissions against them, I am asking him what happened without bringing any document to his attention. I only want the facts.

Trial Examiner Norwood: Read that statement.

(Statement by Mr. Brick read.)

Trial Examiner Norwood: Now, the Counsel has not stated my position on that, but we will let that pass.

Mr. Brick: Well, I am sorry. I think Your Honor understands that I was approaching it in as good way as possible.

Trial Examiner Norwood: Well, I think it is a rather bad approach.

Now, this letter here, Commission's Exhibit 1145, does go to the matter of some agreement or some arrangement here, refers to the 15 cents a barrel charge, but it does not go at all into the reasons for trucking or reasons for manufacturers opposing trucking, and, as I say, we have covered that abundantly in every conceivable particular, so I shall let my ruling striking that answer stand, and the Counsel may take this exhibit and may question the witness about any particulars in that exhibit as to what they agreed on, and what—

Mr. Brick: Well, that is assuming that there was an agreement without reference to agreement. I want him to say what happened.

38456 Trial Examiner Norwood: If the Counsel will let me finish—as to whether or not they agreed, and as to what was suggested by Mr. Smith and what was suggested by the others on those subjects covered there.

I think that is clear.

Proceed.

Mr. Brick: Well, first of all, I will offer to prove in addition to what the witness included in his partial answer to my last question, that Mr. Smith told Mr. Duffy that trucking from mills interfered with his mill operations, that it created an additional hazard, that it was more expensive to the Pennsylvania-Dixie Company to handle deliveries to trucks than it was to ship by rail, that the Penn-Dixie Company was charging 15 cents above the base price at its respective mills, on shipments to trucks loaded at the mill for the purpose of compensating the company to some extent for the additional cost, and inconvenience of loading trucks, and that Mr. Smith also told Mr. Duffy that he, Mr. Smith did not like the policy of loading trucks at the mills, but that the company could do nothing about it because it was necessary for it to be competitive with other companies which did load trucks at the mills, and they could continue to load them at the mills for the purpose of being competitive.

By Mr. Brick:

38457 Q. Mr. Browder, did Mr.—

Mr. MacIntyre: Now, if your Honor please.

Trial Examiner Norwood: Now, wait a minute.

Mr. MacIntyre: If Your Honor please, in an effort to save time, we stipulate that offer of proof as the witness

testimony, and the record may be taken as if it is his testimony.

Mr. Brick: What was the purpose of the objection, then, and wasting all the time in the meantime?.

Trial Examiner Norwood: It may be received as a stipulation.

By Mr. Brick:

Q. Mr. Browder, did Mr. Smith make any statement to Mr. Duffy to the effect that the best way to control the situation was the making of an arbitrary charge on all cement loaded on trucks at the mills?

A. No.

Q. Did Mr. Smith make any statement to Mr. Duffy to the effect that there was or that there had been any agreement among cement companies to make a charge of 15 cents a barrel?

A. No.

Q. Did you have any subsequent conversation, Mr. Browder, with Mr. Smith concerning Mr. Duffy's visit?

A. Yes.

38459 Q. Mr. Browder, in connection with the conversation concerning which you gave some testimony, that being the one attended by you, Mr. Blaine Smith, and Mr. John Duffy, in the course of that conversation did Mr. Smith make any reference to an agreement relating in any way to the elimination of trucking?

A. No.

Q. Did Mr. Smith make any reference to any agreement having anything to do with a 15 cent charge added to the mill price in connection with sales to customers who took delivery at the mill?

A. No.

Q. In trucks?

A. No.

Q. Since the Penn-Dixie Company eliminated the
38460 delivery of cement to customers' trucks at its mills, have there been any requests from customers to take delivery by truck?

A. Yes; there is an occasional request.

Q. Do you recall the circumstances in any such situation?

A. I recall one.

Q. Will you state the circumstances concerning that?

A. It was a highway job that we sold for shipment from our Clinchfield, Ga., mill, at a little point by the name of Pridgen, Ga., about forty to fifty miles from our mill, and the contractor wanted to take deliveries in trucks, or at least stated that he would take deliveries in trucks, unless he could get a reduced rate, and asked for it on that basis.

Q. What was your connection with that transaction?

A. Well, he took it up with the Southern Railway about reducing his freight rate from Clinchfield to Pridgen, threatening to use the trucks, and the railroads took the matter up with me, the officials of the Southern Railway, to know about the trucking situation, and I advised them that we were not making deliveries to trucks, and would not sell on that basis.

Q. And how did your company handle that particular request?

A. We refused to permit him to take it from our mill.

38463 Q. Mr. Browder, has the Penn-Dixie Company ever shipped cement by water from any of its plants?

A. Yes.

Q. Have such shipments been frequent?

38464 A. No, very infrequent.

Q. And from what points?

A. The only plant we have ever shipped by water from was the Richard City, Tenn., plant.

38465 Q. Mr. Browder, how long has the Penn-Dixie Company been a member of The Cement Institute?

A. Ever since the beginning of The Cement Institute.

Q. Have you ever been an officer of trustee of The Cement Institute?

A. No.

Q. Now, the record shows that you were a member of a marketing research committee.

A. That is correct.

Q. When did you become a member of that committee?

A. In September, 1936.

Q. Had you participated in any of the activities of that committee prior to that time?

A. Yes. I had served as traffic consultant and as an unofficial secretary, I guess you would say, to that committee prior to my becoming a member of it.

Q. When was the committee organized or appointed?

38466 A. I believe it was in '34, 1934.

Q. What was the purpose of the committee?

A. It was to cooperate with the Federal Trade Commission in a joint study of the cement industry practices by or through economists.

Q. Does the Pennsylvania-Dixie Company receive statistical reports published by The Cement Institute?

A. Yes.

Q. Does it receive the statistics published by the Bureau of Mines?

A. Yes.

Q. What is the difference in the use made of

38467 those statistics from those two sources by your company?

A. Well, there are statistics—the reports we receive are kind of a different nature. The reports we receive from The Cement Institute as to shipments simply show the shipments out of the various districts as described by the Bureau of Mines. The reports that come from the Bureau of Mines show not only the shipments out of each district, but the shipments in to the various States, and, of course, the Bureau of Mines' report is a great deal fuller and gives more information and is more accurate than the Institute's report we get.

Q. What use does your company make of those statistics?

A. Why, we use The Cement Institute statistics for very little except as a matter of preliminary information. We get that a little earlier than we get the Bureau of Mines' report, but the Bureau of Mines' report we use to find out for ourselves just how we are performing in every market.

Q. You mean performing with relation to your competitors?

A. Yes, to our competitors and to our previous sales.

Q. Do you use these statistics in planning your mill operations?

38468 A. No. We use those statistics in seeing what we have done in the past. What we base our future operations on is reports like the Dodge reports and announcements as to highway programs, and things of that kind.

By Mr. Brick:

Q. Do you subscribe to the Dodge Service?

A. Yes.

Q. Do you know the average cost of the Dodge Service to your company per year?

38469 A. Yes; the Dodge Service costs us about an average of about $2,500 a year.

By Mr. Brick:

Q. In studying any of these statistics to which you have referred, Mr. Browder, is the Penn-Dixie Company concerned with the shipments of any particular competitors?

A. No; we are concerned with our own shipments.

Q. Now, if you find through these statistics that your company has fallen behind with relation to its past business, what does your company do about such a situation?

A. We get right in behind the district sales manager in charge of that territory, and the salesmen in that territory, to find out what is wrong in that territory.

Q. Does your company have any understanding or agreement with any of its competitors in connection with any statistical information, whether it is supplied by the Institute or not?

A. No.

38476 Q. I notice in the record, Mr. Browder, at page 38198, I asked you the following question:

"Now, how would the railroad handle the shipment if you did not enter the rate and the routing on the bill of lading, or enter one or the other?"

Do you understand that question?

A. Yes, I understand it.

Q. Will you give an answer to the question which I put to you?

A. Yes.

38477 If you deliver the railroads a bill of lading with neither the route nor the rate shown in it, it is the duty of the railroads to forward that shipment via the route producing the lowest possible rate. Now, if they have several routes that produce the lowest rate they would, of course, forward it by the route that would give them their greatest proportion of that rate.

Now, I believe that another part of your question there, that if one or the other is inserted in the bill of lading:

If you insert the route in the bill of lading without inserting the rate in the bill of lading, then the railroads will take that shipment and forward it via that route, and it is necessary for you to pay the rate applicable via that route whether it is the highest or lowest rate, you would have to pay whatever rate is applicable.

Now, if you give them a bill of lading with the rate in it without any route in it, it is the duty of the railroad to forward the shipment via any route they have open that will produce that rate, but if they do not have any route showing that rate,—I mean, over which that rate is applicable,—then they must call your attention to the fact and get you to either change the rate, or—yes, you would just have to change the rate; they would not accept it.

Q. You mentioned in your testimony, Mr. Browder, something concerning your method in converting 38478 freight rates from cents to hundredweight—may I withdraw that part—that is, you referred to the method which you have followed in converting freight rates from cents per hundred weight to cents per barrel. Do you recall that?

A. Yes.

Q. How long have you been using the method to which you referred?

A. Ever since I have been in the cement industry, since 1923.

Q. Was that any different from the manner in which you made those conversions when you were working with the railroads?

A. Well, in so far as the disposition of fractions is concerned, there is no particular difference, but in the railroad work I did not have to convert from hundred pounds to barrel; that rate is published per hundred pounds; but where fractions occur in publishing rates they dispose of the fractions in that way where the fractions are to be disposed of.

Q. And in connection with your railroad work, did you or did you not have occasion to use fractions in determining rates per hundredweight?

A. Oh, yes, many rates are published in fractions.

Q. And in determining your hundredweight rates, I understand, then, that you followed the same method as you have since followed in connection with converting freight rates from cents per hundredweight to cents per barrel?

prices, and that will be simply having a price reduction, not a price cut.

Q. Has it been your experience that competitors of your company have quoted prices less than their published prices to dealers?

Trial Examiner Norwood: You have told us that
38483 you had reason to believe in certain instances they had, and consequently you have given a lower price. Now, he is asking whether or not the competitors in those cases actually did give those prices. Make your answer factual.

A. I would say we have no direct proof of it, but we believe that it goes on constantly.

By Mr. Brick:

Q. Does your company meet the price cuts to dealers, and when I say "price cuts," I mean prices which are quoted and are lower than the written quotations sent out to the trade?

A. No.

Q. Will you explain why it does not?

A. Well, in the case of a dealer, the dealer is not only competing with our brand of cement with other brands of cement through his own warehouse, but he is competing with other dealers in the same town or vicinity selling our cement, and we do not feel that we can give a cut price to one dealer without making it effective to all dealers, and therefore we just refrain from giving these cut prices to dealers.

Q. In what parts of your sales areas, Mr. Browder, have you given prices to contractors which have been under your published quotations?

A. At various times in all territories we serve.

38484 *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Browder, in these last several answers that you have given to Mr. Brick, in which you used the term "published price," you had in mind in that connection, had you not, an equivalent; that is, the quoted delivery price is the equivalent of the base price, plus rail freight?

A. Not always; no.

Q. Well, in all areas, except the so-called arbitrary areas around, say, New York City, and the like?

A. They are published prices which are shown on our quotations and mailed to our dealers over the territory.

Q. But, generally, they are the applicable basing point price, plus rail freight; is not that correct?

A. No; they are our price bases at our mill, plus our freight rate, as far as we can get them. When we find they are higher than our competitors are quoting in some destinations, in some territories, then we meet our competitors' prices.

Q. Now, Mr. Browder, can you cite me any delivered price quotation made by your company during the
38485 period from July, 1932, to July 2, 1937, in the area reached by the Kingsport-Richard City mill of your company, that was anything other than the applicable basing point, plus freight, except, say, to the United States Government on certain of its destination costs?

38486 A. Yes, Mr. MacIntyre, I can give you illustrations of these prices that I was talking about in answer to Mr. Brick's question.

Q. I am talking about published prices.

A. Your question did not say "published prices."

Q. Well, I think it does. I meant it to, and I want it applied in that manner.

A. That is different.

Our published prices, as I stated, are our quotations at our mill at the time of any price change. They will all figure back to the price base, plus freight rate, except where they are made otherwise, what you call arbitrary prices.

Q. That is to say, such as New York?

A. Around New York and Boston.

Q. When you say "direct published prices," you mean just that; that is, that they were the equivalent of the base price plus rail freight?

A. By our published prices, I mean all prices,
38487 arbitrary prices, and every other kind of prices. They are our published prices.

Q. But in the area where the applicable base price prevailed, you had in mind, when speaking of the published price, the base published price, plus freight?

A. No, I did not have that in mind.

Q. You mean the equivalent of that?

A. I meant that they were our prices, based on our price base at our mill, plus our freight rate.

Q. In all instances?

A. All those prices in all the territories to which we could get them. When we find they are higher, then we meet the price of our competitors. When you check back on all of these prices, the prices in our mills' territory, or based on our mills, these other competitors' quotations will figure back to their mills, their price base, plus the freight rate; that is correct.

Q. Referring again to the period that I called your attention to, what can you cite me as published prices made by your company that are or have been not the equivalent of the base price, plus rail freight?

A. I can't name all of the specific points, but I can give you quite a number of areas.

Q. Well, specify them.

A. Well, we had various ones down in Florida.

38488 Q. At the ports there?

A. Around the ports there; various ones around New York, Baltimore, Boston, Providence, and various other inland towns.

Q. What inland towns?

A. East Ithaca, N. Y., is one; Fort Des Moines, Iowa, is one. We had various prices of that kind around our mill at Kingsport at one time.

Q. Just at the mill?

A. No; we ran out from the mill a distance.

Q. To how many points around the mill?

A. Well, I would say 150.

Q. Can you name any of them?

Mr. Brick: Any other what, Mr. MacIntyre?

Mr. MacIntyre: Points where the price quoted did not reflect the base price, plus freight?

A. Yes; Croghan, S. C. I don't recall any more right now. That is all I can think of.

By Mr. MacIntyre:

Q. How many destinations did your company issue price quotations to?

A. Well, around about 3,000, I think, or more.

Trial Examiner Norwood: I would suggest that the time consideration requires that counsel exercise just as much selectivity in cross-examination as I suggested for the Respondents in their direct.

38489 Mr. MacIntyre: We have endeavored to do that, Your Honor, and we have made a check of the rec-

ord and we find that we used less than 25 percent of the testimonial matter as the witnesses of the Respondent.

Trial Examiner Norwood: We do not have to run all over these little points, like you do, 25 or 50 times.

Mr. Brick: Twenty-five percent is pretty high.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: Mr. Leisure claims you need six times.

Trial Examiner Norwood: ON the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. Now, Mr. Browder, what percentage of your total business has been involved in these departures from your published prices in your sales to contractors?

A. I would say at various times as high as 60 to 70 percent of our business.

Q. Do you sell 60 to 70 percent of your business to contractors?

38490 A. You are asking me what percentage of our business had been sold at these prices, which were at these arbitrary prices? That is what I was answering.

Mr. MacIntyre: Will you just read the question, Mr. Reporter.

Trial Examiner Norwood: Read it.

(Question read.)

A. It is a very small proportion.

By Mr. MacIntyre:

Q. Five percent?

A. Oh, it would not go that much.

Q. One percent?

A. It would hardly be one percent of our business.

Q. You never had any departure from your published prices in your sales to dealers, have you?

A. No, we have not had any departures to dealers.

Q. Now, just a short while ago Mr. Brick asked you the question concerning the population of certain towns.

A. Yes.

Q. I will ask you, what was the population of Fort Peck, Mont., when the Government, the United States Government, asked for bids on 600,000 barrels for delivery there?

A. I have not checked it. I have no idea.

Q. Now, with reference to these questions that Mr. Brick asked you concerning the Dodge Service,
38491 isn't it a fact, Mr. Browder, that your company in its use of the Dodge Service supplies cards to all of its salesmen on particular jobs in the territory they cover, showing the information that you secure from the Dodge Service as to the amount that is to be expended in the building of a house, and how much cement is estimated in the use of it, and everything like that, and then along with that give them instructions that they cover that job and attempt to sell the cement?

A. We do not send the Dodge report to our salesmen. We get that in our office and we make up our file, and send the salesman a sheet for his job book, as we call that. He puts that in there, that is part of the service we get from the Dodge reports.

Q. You take that job information off the Dodge Service and send it to your salesmen?

A. That is right.

Q. Now, do you get anything similar to that from The Cement Institute as to jobs?

A. No.

Q. You told Mr. Brick that you never served as a trustee of The Cement Institute.

A. That is correct.

Q. But when Mr. Blaine Smith was president of your company, he did serve as a trustee of The Cement Institute, didn't he?

A. So I understand.

38492 Q. He also served as president of The Cement Institute?

A. So I understand.

Q. Well, you know, don't you?

A. By hearsay; that was all. I understand he was a trustee. I have been told that. I was not present when he was elected, and I do not know.

Q. You saw reports in the offices of your company to the effect that he was president of The Cement Institute?

A. That is right.

Q. You have related at length, Mr. Browder, statements that were made during a conversation that occurred between Mr. John Duffy, vice president of the Lehigh Valley Railroad, and Mr. Blaine Smith, president of your company during 1931; do you recall?

A. Yes.

Q. What was the first word that was said between the gentlemen when they went into the office together?

A. I did not try to repeat the conversation verbatim. I gave my recollection of the conversation and the subject that covered it.

38493 Q. What did you say as to the last statement Mr. Smith made?

A. I said I could not repeat verbatim any word of that transaction. I can only repeat the general outline of the conversation as I recall it today.

Q. Then when you testified here, Mr. Browder, that Mr. Smith did not make any particular statement, any particular words, you are just merely testifying that you

38494 have no recollection that he used those words; is that correct?

A. Yes, so far as I recall, and I remember the conversation very distinctly.

Q. Well, I have asked you to give the words of the last statement that he made, and you told me you cannot do it.

A. I cannot do that, no.

38495 Q. Do you mean to say that you have no recollection that he made such a statement?

A. No. I recall the conversation very distinctly, the gist of the conversation, but the verbatim words of the conversation, Mr. MacIntyre, I cannot give you that, and I cannot give you any other conversation I ever had, even yesterday.

Q. Can you give me the last statement that he made?

A. No, I cannot.

Trial Examiner Norwood: Now, he answered that. Go ahead.

A. I cannot. I do not know whether it was his first or last.

By Mr. MacIntyre:

Q. You cannot tell me what statement he made at the beginning of the conversation?

A. No. The only thing I remember is I introduced Mr. Duffy to Mr. Smith, and I imagine he said, "I am glad to meet you." I think that was the opening, but whether that was what he said or whether it was, "I am pleased

38496 to meet you," or any other thing, I could not tell you to save my life.

Trial Examiner Norwood: We will have a five minutes recess.

(There was a short recess taken.)

Trial Examiner Norwood: Gentlemen, please come to order.

Proceed.

By Mr. MacIntyre:

Q. Mr. Browder, referring again to this conversation that you say you overheard between Mr. Smith, Blaine Smith, and Mr. John Duffy, of the Lehigh Valley Railroad, what has Mr. Smith said to you about that conversation since it took place?

A. He told me—gave me a paper to read and said to me that, did I say that, and I told him no. He said, "Well, don't bring any more of your railroad friends in to see me if that is the way they report matters."

Q. You mean the paper you showed him, or it was shown to you, was this letter of John Duffy's?

A. No. It was a Federal Trade Commission's white book that was published.

Q. What was the most recent conversation you had with Mr. Smith on that subject?

A. I have not had any conversation since, that I know of.

Q. You have not talked with Mr. Smith since this came up about that?

A. Not about that, no; I had no occasion to talk to him about it.

Q. What conversation have you had with others about it?

A. Do you mean—I think I talked to Mr. Duffy when he was up in the hearing room, I was present when he testified about the same letter, and I think I mentioned something to him there about it, about the letter, in a joking way. I do not know what I did say to him now, but I did mention it to him when he got off the stand that he used the wrong choice of words, or something.

Q. Is it your testimony you have not talked to others since you talked to Mr. Duffy about that?

A. I talked to our attorneys about it.

Q. And they had shown you Commission's Exhibit 1145, which was Mr. Duffy's letter; is that correct?

A. Yes, I have seen that exhibit, yes.

Q. And discussed it with you at length?

Mr. Brick: Oh, I object to that question, if Your Honor please. That is an idle waste of time.

Trial Examiner Norwood: The objection is sustained.

By Mr. MacIntyre:

Q. Now, will you tell me what Mr. Smith told you when you brought the—or when the white book was brought to your attention?

A. Mr. Smith called me into his office and handed
38498 me this white book, opened at this page, and asked me to read this paragraph, pointing to it, and I read it, and he simply said to me, "Did I say anything like that in my meeting with Mr. Duffy," and I said "No," and he said, "Well, don't bring any of your railroad friends in here again if they can't report matters more accurately," and that is all that was said about it, and I walked out, and was pretty glad to get out at the time.

Q. Mr. Smith was depending upon your memory of that conversation at that time?

A. I do not know what Mr. Smith was depending on.

Q. What did Mr. Smith say then as to what he had said?

A. He did not say anything because I left and went back to my own desk.

Q. Again I ask you, Mr. Browder, is it your testimony that Mr. Smith did not make the statements, such as are attributed to him in this letter of Mr. Duffy's, or is it your testimony that you have no recollection of such statements?

A. It is my testimony that he did not make such statements as are shown in that letter.

Q. Yet you do admit that you do not recall the words, all the words that were spoken?

A. No, sir; I cannot recall verbatim the conversation.

Q. Do you recall the conversation about the 15 cents per barrel?

38499 A. Yes, I recall the discussion about that.

Q. But you cannot recall the words?

A. No, I can just recall the general nature of the conversation and the gist of what was said, but not word for word. I said I could not repeat a conversation that I had yesterday verbatim.

Q. Mr. Brick asked you about your service as a member of the Marketing and Research Committee of The Cement Institute. Do you recall?

A. Yes, sir.

Q. And of your work in that connection with the Clark Burns, Professors.

When your company prepared replies to the questionnaires that it had received from Professors Clark and Burns, you made up those replies, didn't you?

A. Yes. I made them up.

Q. In their entirety?

A. I made up those replies and submitted them to the other executives of our company, Mr. Smith, and Mr. Wing, and in some cases, as I recall, Mr. Killian checked into some of them and they were approved and sent, but I made up the work sheets and fixed them up.

Q. Do you recall this answer that you made to question 10 B, sub 3, appearing in Commission's Exhibit 975-10 F. (showing document to the witness)?

38500 A. Yes, as I recall it, that is the answer.

Q. You prepared that?

A. Yes.

Q. And you prepared similar answers—in fact, in the same words for each of your mills; that is, for the question—I mean, a reply to the questionnaire for each of your mills?

A. I believe they were substantially the same. I have forgotten the exact wording on them.

Q. Now, Mr. Browder, referring to your testimony, stipulated testimony, appearing at page 38149, beginning at line 12, setting forth your reasons as to why your company discontinued deliveries to trucks, I will in that connection ask you why you did not include in your testimony the answer that you made, and which appears in Commission's Exhibit 975-10 F, to the effect that one of the reasons you had discontinued trucking was because it was impossible to accurately figure the cost of delivery by truck and therefore the manufacturer had no control over the delivered price at destination which is necessary to prevent disruption of marketing prices at destination? Why didn't you include that reason in your testimony?

A. I do not know of any reason why. It probably did not occur to me at the time, if it is not in there.

Q. In other words, when you gave your testimony here, even though it was in stipulated form, and you and your attorneys had prepared it, that particular reason did

38501 not occur to you to put into the record here?

A. No, it did not occur to me.

Q. You do know, however, that that is one of the—is a

factual matter bearing on one of the vital issues in this case, do you?

Mr. Brick: I object to the question, if Your Honor please.

A. No, I do not know that that is one of the vital matters.

Trial Examiner Norwood: The objection is overruled.

By Mr. MacIntyre:

Q. You have been reading the testimony of other witnesses who have preceded you for the defense in this case, have you, Mr. Browder?

A. I have read very little of it, Mr. MacIntyre.

Q. You not only read the testimony of some of the Government witnesses, but you have attended hearings on a number of occasions, haven't you?

A. I think I have heard more testimony in the court room here than I have read in the records.

Q. This morning Mr. Brick asked you about your quotation of prices to the Federal Government on an f.o.b. mill basis. You stated your company had made such quotations. I will now ask you if you can cite me any instance between the dates of July, 1932, and July 2, 1937, when your company made f.o.b. mill price quotations to the 8502 Federal Government without reference to any destination cost or destination commercial prices that your company had quoted?

A. I cannot probably refer you to the exact letting dates. I don't have those in mind, and the points where the tonnage was to be used, but I can say this, that in every bid that was taken prior to 1934, where land-grant rates were involved, we bid an f.o.b. mill price.

Q. Without reference to Government destination cost or commercial delivered prices as quoted by your company?

A. Yes.

Q. How did you arrive at your f.o.b. mill price that you quoted in those instances?

A. Well, of course, we had to be governed by the cost to the Government at destination, because that is the way the Government tabulates their bids or makes their awards, what it is going to cost them at destination, and we would figure our price to meet the competition that we found in the field from every other mill that could possibly ship in there. We quoted our mill price at such a figure that it would meet their price, plus their freight rate to destination.

Q. So you did calculate them in that way, then?

A. Yes; you have to figure on the destination cost to the Government, or you never get an award.

Q. Can you cite me an instance where you quoted a so-called f.o.b. mill price to the Federal Government
38503 that was not so calculated by your company?

A. If we wanted the business, we calculated it that way.

Q. Can you cite me an instance?

A. No.

Q. Where you made any quotation, so-called, f.o.b. mill, which was not calculated in that manner?

A. To meet competition at destination, that is correct. Every bid we figure on, either commercially or Government, is figured that way.

Q. You testified this morning that you had not exchanged any land-grant rate information with your competitors, Mr. Browder.

A. Not that I recall.

Q. You did send land-grant rate information, or estimated land-grant information, to The Cement Institute; did you not?

A. No; I don't recall that I did.

Q. Your company received such information from The Cement Institute?

A. They received some from The Cement Institute, but I do not recall sending one to them.

Q. But, you received—that is, your company received it from The Cement Institute for quite a period of time; did it not?

A. Yes, they received quite a bit of information.

Q. Until some time in 1937, when they discontinued the distribution of it?

38504 A. I have forgotten the exact date, but we received these sheets from them, showing the land-grant rates, and all that.

Q. Those land-grant rates were estimated land-grant rates; is not that correct?

A. I don't know where they came from, Mr. MacIntyre.

Q. You examined them, did you not?

A. I saw them; I saw the sheets, yes. I didn't check into them.

Q. What did you do with the sheets when you got them and saw them?

A. I just filed them away in the file.

Q. Anything else?

A. No.

Q. You never had any communication with The Cement Institute about the receipt of them?

A. No; they just sent them to me, and that was the last of it. There was no covering letter, or anything else.

Q. You just glanced at them and filed them?

A. Yes. We had no use for them; we didn't ask them—I didn't ask them for them. We got our land-grant information, as I testified this morning, from the tabulation of the Government bids, and those are the rates that we used.

Q. And through the railroads?

A. From the railroads, when we cannot get it from the Government.

38505 Q. You told us this morning that the information you did get in that manner, the land-grant rates you had found subsequent to your bid have not been the land-grant rates figured and used by the Government in its settlement with the railroads?

A. No, I said in the tabulation of the new bids—I testified to this, that we will use the land-grant rate that the Government used in the tabulation in the last bid, and then when these new bids are taken and they tabulate those, we find that the Government sometimes inserts the new land-grant rate, or several new land-grant rates.

Q. And you do not know whether the Government in either case actually settles with the railroad for the transportation of the goods on the basis of either one of those rates?

A. I don't know that they ever settle with them for it; no, sir.

Q. You are sufficiently informed on traffic matters to know that the only accurate and legal land-grant rate is the one which is used in the settlement between the railroad and the Government; is not that correct?

A. I don't know whether it is accurate. I don't think that is exactly correct, Mr. MacIntyre. The railroads can state what they figure their land-grant rates are on shipment moving via their lines and submit their bills to the Government on that basis. The Comptroller General, as I understand it, has his land-grant rates figured, and offers to make settlement on the basis of his own figures.

38506 Then, if the railroads do not want to accept the Comptroller General's figures they can file their

claim with the Court of Claims, and there is some hearing on it of some kind, and some settlement is made, as to which one is correct. I cannot say that the railroad figures are the correct, legal, land-grant rates, or that the Government figures are the correct, legal land-grant rates; but I know in most cases they are the final ones, and the Government says that is what they are going to pay, and they pay it, and that is the end of it.

Q. They are the only accurate ones, are they not, the ones that are used in the settlement?

A. I would assume you could say that. They are the final ones, whether accurate or correct or not.

Q. Those that you have used were merely the estimates of what you probably would have used in settlement; is not that correct?

A. I don't know where they came from. They are supposed to be correct and figured by the Federal Traffic Board, most of them, but whether they are estimates, I don't know, and that is all I would have to go by.

Q. In those instances where you have used in your bid the land-grant rates higher than the ones used by the Federal Government and the railroads for the settlement of transportation of cement, would you say that the
38507 Federal Government had received the full benefit of the land-grant rates involved in that transaction?

A. I don't know that that has ever occurred, Mr. MacIntyre. I don't know what those rates are.

38508 Q. Did you not testify this morning, Mr. Browder, that the Federal Government secured the full benefit of land-grant rates applicable on its shipments of cement?

A. I testified that we gave the benefit—gave the Government the benefit of the land-grant rates, meaning, of course, land-grant rates that we were able to secure, and I explained how we secured them.

Q. In these instances to which you testified,
38509 where the Government used different land-grant rates in its tabulations from the ones that you had used in your bid to the Government, is it your testimony that the one the Government used was always higher than the estimated one that you used, Mr. Browder?

A. Oh, no. They have put in new rates that were lower than the ones that they had previously used. No, they changed them up and down, as the case may be.

Q. Would you say that in some instances the Government has placed in those tabulations land-grant rates that were lower than the ones that you estimated they had used?

A. That they had previously used, and we thought they would use the following time; yes.

Q. And you used a higher one in your bid?

A. That is correct.

Q. In a situation in which you did that, Mr. Browder, did you consider that the Federal Government got the full benefit of the land-grant rate that was involved in that transaction?

A. Yes; they got considerably more than the land-grant rate, because we made an allowance in our price to take care of the high land-grant rate, and the Government comes along and says they have a lower land-grant rate. Then they get more than the benefit. They get the benefit of the higher rate.

Q. You have never known them to enter into a second transaction and used a higher rate than they used before?

38510 A. In that case we simply would not get the business. Our bid would then be high.

Q. In those instances where that has occurred, and your competitors quoted the same price, would you say that the Government had received the full benefit of the land-grant rate?

A. I don't know of any case where you are bidding at your mill and you can quote the same price as your competitors and get the business, because your rates are all different. In a tabulation of the mill bids, I don't think I ever saw any case, except where the mills were at the same point, that they would have the same price f.o.b. the mill.

Q. But they would have the same destination costs when they applied an estimated land-grant rate from the applicable basing point to the destination involved; is not that correct, Mr. Browder?

A. Not necessarily. It may have been what they were trying to do, but it doesn't always work out that way.

Q. Don't you know it has worked out that way?

A. I say not necessarily. It has worked out, and that is what we are trying to do, always.

Q. In each instance where it has worked out, and where you have used a lower land-grant rate than the Govern-

ment used, you have not given the Government the full benefit of the land-grant rate involved, have you?

A. Not of the land-grant rate that was an-
38511 nounced after our bid was opened; no. We gave them the benefit of the land-grant rate which was supposedly in effect at the time the bids were opened.

Q. That is, the one you thought would be applicable?

A. That is correct.

Q. But you did not give them the full benefit of the one that they applied?

A. No; we are not clairvoyants. We can only work on the knowledge that we have. We cannot foresee what the Government or anybody else is going to do.

Q. So when you gave your testimony here today, to the effect that the Government had in all cases received the full benefit of the land-grant rates, you would have to now consider it qualified, at least in the manner that you qualified it within the last few minutes?

A. I don't think—

Mr. Brick: I object to that question, if Your Honor pleases. As I recall the testimony—

Trial Examiner Norwood: Please do not cite the testimony.

I will overrule the objection. Answer the question.

A. I don't think I testified just that way, Mr. MacIntyre. What I think I said was that we quoted so as to give the benefit of the land-grant rates to the Government, to the best of our knowledge and belief, and if I may
38512 qualify my previous statement to the effect, to the best of my knowledge and belief, then it stands. I do not mean to say we always give it to them, because when they change the land-grant rate, then at best those are calculations also to that extent.

Q. There would be no question about the Government receiving the full benefit of the applicable land-grant rates if you did bid to them an f.o.b. mill price, without reference to the Government destination cost or delivered price quotations; is that correct?

A. Well, I don't know. It may or it may not. It depends upon what the price that you bid f.o.b. your mill is, how you arrive at it, and what the figure is. Mr. MacIntyre, the Government can ship from our mill on a commercial freight rate and secure the benefit of the land-grant rate, which they can secure from some other mill, if we make the difference in the allowance in our mill price.

Q. Yes; but you place an "if" there, Mr. Browder.

A. You always have to have that in there.

Q. I am taking an unqualified mill price, a fair price, the very best you can give to the Government with respect to your mill net. If you so gave it unqualifiedly, the Government could then take the cement there and secure the full benefit of the land-grant rate as finally applied; is not that correct?

A. No; not by a long shot.

Q. Why not?

38513 A. If we fix the price at our mill at whatever figure you use, say, a dollar, two dollars, or three dollars, and sell to the Government at that price, I don't know, or I couldn't say that they were getting the benefit of the land-grant rate.

Q. If the price, plus the land-grant rate that they applied, makes the lowest destination cost, it would give them the full benefit, would it not?

A. We have so many destinations where we have no land-grant rates now.

Trial Examiner Norwood: Answer the question.

A. No.

By Mr. MacIntyre:

Q. I am talking about the destination where the land-grant rates apply.

A. No, that would not give them the full benefit of the land-grant rates. We might not have the rate that was the greatest land-grant deduction.

Q. If your mill price given to the Government unqualifiedly, plus the applicable land-grant rate, would make the lowest destination cost, the Government then would get the full benefit of the land-grant rate applicable?

A. When you add in that that makes the lowest destination cost to the Government, then that is true; yes.

Q. That is, the Government would get the full benefit, because it would be applying the rate then to that unqualified mill price.

38514 A. Which produced the lowest destination cost to the Government.

Q. Now, you remember your testimony of this morning concerning this question of correspondence between you and a number of traffic managers of your competitors concerning the average car rate on shipments to the Chickamauga Dam.

A. That is right.

Q. It had to do with Commission's Exhibit 883 and Respondents' Exhibit 2923 A to H. Do you recall that?

A. I recall that.

Q. The average car rate that you were interested in having the T. V. A. accept was the one applicable from Boyles, Ala., to Chicamauga; was it not?

A. No; the only thing I suggested—I made no suggestion about the rate at all. I suggested the weight of the car. In other words, I took all of the cars which we had shipped to T.V.A., and averaged them, and found that they averaged about 225 barrels per car, and I suggested to Mr. Rockwell that we take the applicable land-grant rate and apply it to this average of 225 barrels per car, and use that on all cars, that rate, regardless of the number of barrels that were in the car. There was no averaging of the rate at all.

Q. But it so happened that the rate that determined the price that the T.V.A. was to pay was based on $1.45 at Boyles, plus this average car rate that you had worked out to Chicamauga; is that correct?

A. No; it was just $1.40 at Boyles, plus the land-grant rate from Boyles, that made, as I recall, the price to the T.V.A. on that particular job.

Q. When you say "plus the land-grant rate," you mean plus this land-grant average car rate that you had worked out on this formula?

A. No, no. It was not any average rate at all.

Q. I mean the average car rate. You misunderstand me.

A. Yes.

Q. You worked out a land-grant rate that was based on the formula as to the average car.

A. That is right.

Q. From Boyles to Chicamauga.

A. That is right; yes.

Q. And that had the effect, of course, of equalizing the price charged for the cement, despite the fact that it was shipped from points other than Boyles; is that correct?

A. The price was the same, regardless of where it was shipped from. All the mills had the same price to the T.V.A., whether it was shipped from Boyles or Richard City or Chattanooga or any other point.

Q. So you were principally interested there in getting

that average car formula worked out from Boyles to Chickamauga?

A. No, I did not care where it came from. I did
3516 not suggest anything about the rate at all. The only thing I suggested was that since every different weighted car carried a different total of the land-grant rates, that we take the average number of barrels per car on everything that had moved for the T.V.A., and with our shipments that came to 225 barrels. I suggested that to Mr. Rockwell. I suppose he checked it with his records, and found it was the same, and he thought that that was a fair average, and he was willing to make the settlement on the basis of 225-barrel car. You would have a different rate, a different amount of money, if the car weighed 226 barrels, and you would have a different amount of money if it weighed 240 barrels, you would have another amount, but apply the same rate.

Q. I believe you testified this morning that if this formula had not been worked out there would have been all kinds of prices by each and every one of the companies?

A. There was a different price for every sized car.

Trial Examiner Norwood: That is a different freight charge?

The Witness: And it resulted in a different price to the T.V.A.

By Mr. MacIntyre:

Q. That is, a different delivered price.

A. Yes.

Q. Can you explain to us now or inform us as to the first incident concerning this average car form-
3517 ula that came to your attention?

A. The first incident of it?

Q. The first incident that called it to your attention.

A. It was called to my attention by Mr. Rockwell down in Knoxville, and I was in Knoxville and in his office.

Q. I am asking you about the first incident of it.

A. About the average car, that is where it came up, Mr. MacIntyre.

Mr. Brick: That is what he is telling you.

A. In conversation right in Mr. Rockwell's office, that was the first time that it was brought to my attention, or anything came up about it, and he asked me what we could do to prevent all this figuring that was necessary for

every car. We would ship anywhere from eighteen ten or twelve cars a day on that job and it meant that Mr. Rock well, he was the fellow who had to do the work, he had to figure out every one of these and advise us the price, and he was trying to get something that would prevent that. In other words, the rate and our prices to the T.V.A. were all based on the rates they give us. We had no way of checking them; we accept them when they give them to us, and it is up to them to give us the rate to let us know what our prices are.

By Mr. MacIntyre:

Q. Did you ascertain that he was interested in it from the viewpoint of saving labor on his part?

38518 A. Yes.

Q. And for no other reason?

A. Yes.

Q. That is, for no other reason than that?

A. So far as I knew, it was just a lot of work and very little involved, so far as the differences were concerned.

Q. Now showing you Respondents' Exhibit 2921-A to C, will you please tell us, Mr. Browder, whether the combination—strike that question, the entire question.

Referring to Respondents' Exhibit 2920-A to C, and Respondents' Exhibit 2921-A to C, will you tell us whether or not the all-water, or the combination of rail-and-water rates shown in those two exhibits were lower than the all-rail rates would have been between the destinations shown?

A. For instance, at Wheeler, Ala., Mr. MacIntyre, there was no possible way to get there by rail. The nearest rail point to the dam was about five miles away, and the—it had to be taken up by water or either trucked over from this little town of Town Creke.

At Pickwick, Ala., as I recall it, the nearest railroad station is about 20 miles away, Corinth, Miss., and would have to be trucked from there, so there is no comparison, no way you can compare those figures.

Q. What about the other points that do have railheads?

38519 A. For instance, at Guntersville, Ala., yes, the prices made by the use of the T.V.A. formula and adding these factors one is considerably less than the rate would produce, the rail rate would produce at Guntersville, where you do have a rail delivery and a water delivery.

Q. The same thing would be true if you take the T.V.A. formula plus the all-rail rate; is that correct?

A. Yes, that is correct, but now you see at Guntersville the only way that you could make water delivery at Guntersville was to take the shipment first by rail to Guntersville, and then you got the added cost of unloading from cars to barges, putting it on the river, floating it out to the dam in the river, which was about two miles from the rail delivery point. Your rail delivery point and water delivery point are not the same point for delivery at all.

Q. Except a matter of a few hundred yards, and placing it on the job, it is the same?

A. Oh, no, Guntersville Dam is about two miles.

Q. What about the other points, the railheads shown?

A. Chicamauga, Chicamauga Dam, the dam there is—they built a siding there for that particular dam. There was no siding there at the time this work sheet was made up.

Q. As to the rail rate, though, as to that siding from the points shown on your work sheet?

A. Boyce was the place where you had to put it, there is about, as I recall it, about four miles down the

38520 river from the site of the work.

Q. Now, the rail rate to that point is higher than the water, or water and rail rate that you have in these two exhibits, isn't it?

A. Do you mean the commercial rate?

Q. The commercial or the land-grant, either one that is applicable, the one that is applicable.

A. I did not exactly catch the question. Will you read the question, please?

Trial Examiner Norwood: Read the question.

(Question read.)

Q. I do not understand just what you mean, Mr. MacIntyre.

By Mr. MacIntyre:

Q. I am trying to ask you, Mr. Browder, if the all-rail rate from the shipping point shown on that exhibit, Respondents' Exhibit 2920—

A. Yes.

Q. —to Chicamanga, I am asking you if they are higher than the water rates or a combination of water and rail rates shown on Respondents' Exhibit 2921 or 2920, as the case may be?

A. Well, Mr. MacIntyre, would you mind pointing out to me some particular rate on here? I just do not catch what you have in mind for me to answer, and I am trying my best to do it, but I am talking this place, Chicamauga, for instance, and there no all-water rate, for in-
38521 stance from Richard City to the Chicamauga Dam.

Q. I am talking about all water or a combination of water-rail, Mr. Browder, that was included in my question.

A. And is it higher than what?

Q. Isn't the all-rail rate higher than the combination or all-water rate?

A. Why, certainly, the rate, the commercial rate from Richard City to Boyce is less than the total of the same rate plus the water charge beyond, if that is what you mean. If you add two factors together you get a higher factor than either one of the two you add. You always get that.

Q. Why is that?

A. Well, if you add two figures together it is bound to be higher than either one of those two.

Q. I am talking about for a single haul, now.

A. But they are hauls to different points.

Q. Didn't you testify on direct examination, Mr. Browder, that a combination rail-and-water haul from the Lehigh Valley on cement to Miami, Fla., was lower than the all-rail haul from points in Georgia and Alabama to Miami?

A. At one time it was, yes.

Q. That would been considerably lower than—that is, the combination water and rail rate from the Lehigh Valley to Miami,—considerably lower than the all-rail rate from the Lehigh Valley to Miami; is that correct?

38522 A. Oh, yes, yes.

Q. And why is that?

A. Well, it is because you have a low rail rate from the Lehigh Valley to New York City in the first place, and your rate to New York includes delivery to ship side, loading on barges, and delivering to ship side, and your rail rate—I mean your water rate from New York down includes unloading from the barges and unloading at destination as well as carrying it down there, and that is a low water rate from New York down to Miami, so those two factors added together make a lower rate than the through all-rail rate from the Lehigh Valley to Miami.

But there you are working between exactly the same two points. Now, in the question you asked me about that, we are not working to the same point, we are working with rates to different points.

Q. We are talking about the same point now, Mr. Browder, the Lehigh Valley to Miami.

A. That is lower. It is not lower today. It is from the Lehigh Valley, yes, still lower. There has been no change in rates from the Lehigh Valley.

Q. The combination rail and water rates would still be lower.

A. Than the all-rail rate, Lehigh Valley to Miami, that is correct.

Q. And you told me the reason it is lower is because the loading is included in the rate?

38523 A. I said that is one of the factors.

Q. What was the other factor?

A. You had a low rate to New York which included a transfer to the vessel, and you got a low water rate from New York to Miami, which includes unloading from the barges into the vessel, transporting it to Miami, and taking it off the vessel, and the sum of those factors is less than the all-rail rate from the Lehigh Valley down, but that does not mean that all combinations of all-rail and water rates is less than the all-rail rate.

Q. Yes, we understand that that is not likely to be the case.

Now, you also told us on your direct examination about some water shipments to Miami from Tampa, yes, to Miami from Tampa.

A. Yes.

Q. And I believe you told us that that shipment by water was less than it could have been made by rail?

A. That is correct. It is not less today, though.

Q. But during 1935 it was?

A. It was; that is right.

Q. And I believe you told us about some water shipments from New Orleans around through—

A. No, I do not think I mentioned New Orleans.

Q. Or from some point down the river to the Gulf Coast, and around?

38524 A. No, I did not. I did not testify to that at all. I did say that there were some shipments made from Martinsburg, W. Va., through the Port of Baltimore to Miami, as I recall it.

Q. But it is your testimony that the rate from Miami—I mean from Tampa to Miami by rail in 1935 was considerably lower than by water?

A. No.

Q. Was lower?

A. The rate, all-rail rate was higher.

Q. I mean, the all-rail rate was considerably higher than the all-water rate?

A. That is right.

Q. I just wanted to clear up the information you had given us on direct.

Now, on the dropping of fractions in land-grant rates you testified about this morning, you told us that one of the reasons for the differences in the way that a person arrived at a land-grant rate, I mean the result that they arrived at in figuring land-grant rates from the result arrived at by another one was sometimes due to the dropping of fractions, do you recall?

A. In their calculations, yes.

Q. Do you recall an instance in Alabama just about a year previous to the issuance of the complaint in
38525 this case, where it became a practice on your part and your competitors to use fractions to the third point?

A. I do not recall any particular point in Alabama. I know that my own company, we have found competitors would drop fractions to the fourth place and the fifth place, or the third place, and they finally dropped them altogether, and we have met that competition when we found it; the next time we would bid at that point we would do the same thing.

Q. Do you recall the use of the fractions to the third point?

A. No, I do not have any particular one in mind right now, but I do not say that it was not done.

Q. Now, referring to Commisison's Exhibit 1339, which was referred to by Mr. Brick this morning, I believe you told him that the reason your company did not bid on this particular transaction was because the quantity was indefinite and no destinations were shown and the time of shipment was indefinite. Do you recall that?

Mr. Brick: Will you let the witness have the exhibit, Mr. MacIntyre?

A. Is that the March exhibit you have in your hand?

By Mr. MacIntyre:

Q. I am talking about the subsequent one.

You told Mr. Brick the reason you did not bid on the subsequent one,—that is, the one subsequent to March, 1928, was because no time of shipment was made
38526 definite, no quantity was made definite?

A. I think I said on those, I did not mention the quantities. I think on that they did give you quantities. I think on the first one I said there was no quantities given.

Q. Just tell us why your company did not bid on this 1339—that is, Commission's Exhibit 1339?

A. Well, as I said, it specifies no time for delivery. In other words, if we bid on this,—and I will say this is a very small bid you have here, 5,500 barrels; many of these invitations, as I recall it, included large quantities of cement. Now, this proposal does not say whether this is going to be taken on June 15th, September 15th, or December 15th, and if you were requested, or executed this contract, you would have to have this cement ready for shipment at any time the Government wanted it during the year.

Q. Look at the last paragraph on page 8 of that and see if your answer still holds in that respect, Mr. Browder; see if you want to modify that answer.

A. No, it says here that the estimated—it gives you an estimate, but it says it is very uncertain.

Q. It doesn't say it is uncertain; it says it will not guarantee it?

A. That is right.

Q. But it gives you information there as to how often they will require a car and when they will start
38527 requiring it; isn't that correct?

A. It goes on to say that the estimated requirements for cement are as given in schedule, but due to uncertainties in the progress of construction this schedule cannot be guaranteed.

Q. Does the contractor building a building to whom you have sold cement guarantee you that on a day it is not going to rain and he can take a shipment of a car?

A. No, no, of course not.

Q. So it is just as certain here as it would be there; isn't it?

A. No, it is not as certain there. In other words, when you sell shipments to a contractor you know when the

shipments are going to start and when they are going to be completed over three months or six months, as the case may be.

Q. You know when he is going to take a car on a rainy day?

A. Oh, no.

Mr. Brick: Please don't interrupt the witness, Mr. MacIntyre.

A. We do not care whether he takes a car on a rainy day or not.

By Mr. MacIntyre:

Q. Isn't it your experience with your company, Mr. Browder, that your company has executed contracts, requirement contracts with States, State Governments, for as much as a million barrels of cement without the 38528 State being obligated under the contract to take even half that much?

A. I do not know when we have ever had a million-barrel contract, Mr. MacIntyre, no.

Q. You do not even recall a hundred thousand barrel contract of your company to State Governments on annual requirements?

A. We have probably had a hundred thousand barrels on certain State contracts, not a million. I never remember having a million.

Q. And the State was not required to take a barrel except as required for the job?

A. You have a different situation there, Mr. MacIntyre, on those State requirement jobs. We get them now, as a matter of fact, but it is simply an allocation such as we receive from the T.V.A. on this program that we had. We know it is coming at some time in the future, but we do not know just exactly when we are going to get it.

Now, on those State highway contracts, we have to go back to the State and sell that the second time. In other words, they will give us an allocation of 50,000 barrels to be used during the year 1940. Now, then, a job comes up that we want to ship on. We have to go back to the State highway purchasing department and ask them, "Well, now, will you please give us this particular job on our allocation?" They may give it to us, they may not. If they do not give it to us, we know we haven't got the shipment.

If they do give it to us, we know the contract is
38529 going to start, say, on June 15th, and finish up by July 21st.

Q. And you know exactly when they are going to take each car and how many cars?

A. No, we do not know, we do not want to know about each and every car.

Q. You do not know how many cars they will take or what days they will use them?

A. Oh, yes, we know how many cars it is going to take.

Q. Do you know that on requirements contracts for block manufacturers?

A. No, but we have got a pretty good idea from past experience.

Q. Somewhat uncertain, however, isn't it?

A. Not very.

Q. And you sell him for his requirements over a three months' period?

A. That is right.

Q. And if his business is good you sell him a lot; and if it is poor, you sell him a little, but you have to sell him what he needs?

A. What he wants; that is right.

Q. Well, at the time that you refused to bid on these Government invitations, Commission's Exhibits 1334 and 1399, and 1339, could you sell as much as 50 percent
38530 of the cement that you could have produced at that time, or the next four months following?

A. I could not say how much we sold at that time or any particular time right now.

Q. You haven't been worried about being oversold in the last three or four years, have you?

38531 A. In certain years we have been oversold, yes.

Q. For deliveries—I mean the Lehigh Valley mills?

A. At one of our Lehigh Valley mills we are not oversold except in connection with bin space, and tested cement. In other words, we have so many bins tied up on tested cement for the Government and other contract work that we are hard pressed to keep up with our orders there, and our mill at Clinchfield, Ga., is about filled up. We are shipping—

Q. Well, then, one of the reasons you did not want to bid on these two invitations I am talking about was because you

had so much business you did not want any more business; is that it?

A. No, I did not testify to that.

Q. Now, Mr. Browder, referring to Respondents' Exhibits 2912 and 2911.

A. Yes.

Q. Will you please tell us what you see in those two exhibits or either one of them that you consider authorized you and your competitors to get together with officials of the railroads and agree upon any problem that would be submitted or that could be submitted by anyone present, including yourself, to the Interstate Commerce Commission on any date subsequent to such agreement be-
38532 tween you and your competitors?

A. I do not think I testified to any such statement as that, Mr. MacIntyre. I said that in connection with the railroads at their hearings we did that at the request of the railroads and not in accordance with anything contained in this notice from the Interstate Commerce Commission.

Q. You do not consider that that sanctioned you getting together and agreeing with your competitors on the solution of any of your problems, do you?

A. No, I do not get together and agree with any of our competitors on the solution of our problems. I have not done that.

Q. Even to the working out of a particular rate that you and your competitors desired placed in effect?

A. If it was an oral argument before the Interstate Commerce Commission, I would understand that this would authorize me to work with my competitor, or anybody else, If they were on the same side of the controversy as we were.

Q. That is to agree with them in working out a rate that you and they wanted applied, or just to present the argument?

A. Working out a rate we wanted—

Q. You do not consider that they authorized you to work out and agree with your competitors on a rate that you and they—

A. This has nothing to do with that at all.

Q. No, that is what I thought when they offered
38533 those in evidence, Mr. Browder.

Mr. MacIntyre: I now move that they be stricken from the record.

Trial Examiner Norwood: The motion is denied.

Q. Now, referring, Mr. Browder, to Respondents' Exhibit 2919-A to D, which is the list of the prices you say you filed with the Code Authority for use in your bid to T.V.A., how did you figure those prices?

A. I do not recall the number. That is the Code filing, you say?

Q. Those that you filed with the Code Authority.

A. They were based on the formula submitted to
38534 us by Dr. Morgan, and the land-grant rates furnished us by the T.V.A., the rail rate—I mean the water rate furnished us by the Cumberland River Sand Company and such commercial rates as when they were necessary we found in the published tariffs filed with the Commission.

Q. You received notices from The Cement Institute that your competitors had subsequently filed prices that were identical with those before the bids were submitted to your company, didn't you?

A. No, I do not recall that, that we received any notices of our competitors.

Q. During the course of your direct examination you testified at length concerning your conferences with a Mr. Hawkins of the Southern Freight Association. Do you recall?

A. I mentioned a letter I received from him and a further conversation I had with him. He is the chief traffic officer of the Florida East Coast Railway.

Q. Well, Mr. Tilford of the Southern Freight Association at Atlanta, that you referred to, that you had these conferences with; is that correct?

A. Yes. I do not recall testifying of a talk to Mr. Tilford, but I talked to Mr. Tilford any number of times.

Q. Well, when you saw him about this fourth section relief?

A. Yes.

Q. Under the thirteenth section, for an adjust-
38535 ment in the rates going into Florida.

A. Yes.

Q. From the Southeast, you acted as spokesman for the industry, I believe you stated.

A. No. I acted as spokesman for those companies who were handling the matter, and were of the same opinion that I was, and asking me to handle it for them, to let me speak for them. I did not speak for the industry there.

Q. You acted for all the interested companies there?

A. For quite a few of them. There were some not represented there, and I did not represent them.

Q. How were you selected to act for those companies?

A. I do not recall right now, Mr. MacIntyre, whether I was volunteered to do it, or whether somebody asked me to do it; I do not recall right now why I did it. I know I worked up a considerable amount of rate data, and so forth, on it, and I could not tell you now whether somebody asked me or whether I volunteered to do it. I think, though, that somebody asked me to do it.

Q. Now, at these conferences where you represented your company and these other interested cement companies in conferences with the officials of the Southern Freight Association, were any spokesmen there representing water carriers or the consumers or buyers of cement?

A. No, at none of those meetings do I recall any
38536 buyers of cement being there or any water carriers being there, but they had the opportunity to be there. The meetings were published, the docket—the subjects were docketed, you know, for hearings in the regular traffic bulletin, and they were—

Q. Did your customers receive notice of that from you or from anyone?

A. I do not know. I did not notify any customers. I do not know whether they received it from anybody else or not.

Q. Did you ever attend the meeting at which you represented your company or any of your competitors in conferences with railway officials concerning—and officials of the Association of Railroads—concerning the adjustments of railroad rates at which any of your customers appeared and voiced their views?

A. Yes.

Q. Where?

A. Why, I have appeared at those conferences in New York and in Atlanta, and before the rate committees here in New York; some of our competitors were there and were taking a different view from what we took.

Q. I am talking about your customers.

A. Yes, our customer was there.

Q. What customer?

A. The Riverton Lime & Stone Company, a big customer of ours.

Q. Any other one?

A. No, they were the only ones at those hear-
38537 ings I can recall right now.

38538

Washington, D. C.,
Thursday, May 16, 1940.

38539 D. S. BROWDER thereupon resumed the stand and testified further as follows:

Cross-Examination (Resumed) by Mr. MacIntyre.

Q. Mr. Browder, yesterday on cross-examination at page 38503 you reiterated testimony that you gave on direct examination to the effect that you had not exchanged land-grant information with your competitors. Do you recall that testimony?

A. Yes, in that I recall I did not exchange any.

Q. I show you in that connection Commission's Exhibits 883-2-G, 883-2-H, 883-2-I, 883-2-K, 883-2-L, 883-2-M, and 883-2-N, and ask you to state if that refreshes your memory and recollection to the effect that you did

38540 send land-grant information to traffic managers of your competitor companies?

A. Yes. There is land-grant information in these particular letters, but it was information which, as I understood, they had previously secured from the T.V.A. commenting on the rates furnished us by the T.V.A.

Q. Giving them your interpretation and opinion of that information, too, isn't it?

A. It discusses that situation there, particularly as to the Chicamauga Dam rate.

Q. And I believe you have already testified in this case that the signature appearing on Commission's Exhibits 883-2-G and 883-2-I are those of Mr. Blaine Smith that you placed on there yourself?

A. That is correct.

Q. Those were the documents that you submitted under subpoena?

A. That is right.

Q. Mr. Browder, do you recall discussions and communications you had with your competitors on the West Coast concerning the application of basing points and basing point pricing systems out there in the Los Angeles district?

A. That was in connection with information requested by Dr. Burns, yes.

Q. You did discuss with Mr. Treanor and Mr. Beckett, of the Riverside Company, the application of basing-point prices to Crestmore and Holt in the Los Angeles district; do you recall?

38541 A. I secured that information from them for Dr. Burns, yes.

Q. And to the effect that there was such application in their pricing structure?

A. What application, Mr. MacIntyre?

Q. Of a Crestmore base of $1.72.

A. Yes; as I recall, they advised me that there was a base at Crestmore.

Q. What part did you play in the Public Relations Committee work of The Cement Institute, Mr. Browder?

A. None. I have not had any connection with the Public Relations Committee.

Q. Don't you consider that the work of Professors Clark and Burns was related to the Public Relations Committee work of The Cement Institute?

A. I did not understand that it was, no.

Q. It was a matter of attempting to explain to all people the operation of the basing-point system in the cement industry, wasn't it?

A. No, I did not understand that.

Q. What did you understand to be the significance of the work of Professors Clark and Burns and the Marketing and Research Committee?

A. The Marketing and Research Committee was to undertake a cooperative study with the Federal Trade Commission as to practices in the cement industry through economists.

38542 Q. That is all that you know about it?

A. I did not understand that it was to any public relations.

Trial Examiner Norwood: Is that all you know about it?

The Witness: As to the purpose of that committee, yes, that is my understanding of what it was for.

By Mr. MacIntyre:

Q. Was that still your understanding when you were called in as a member of the Marketing and Research Committee and handed portions of the report to read and review along with Mr. Blaine Smith and Mr. Joseph Young before it was to be published and criticize it?

A. I do not recall now that there was any join-
38543 the relations arrangement in connection with it. It
was all the joint study by these economists of the
Federal Trade Commission and Doctors Burns and Clark
as to the practices in the industry.

Q. Can you cite anything that you consider as evidence of cooperation between the Federal Trade Commission and the Marketing and Research Committee of The Cement Institute?

A. As I recall now, the questionnaires before they were sent out to the various cement companies were submitted to the Federal Trade Commission for criticism or suggestions, and as I understand it the Federal Trade Commission did finally abrogate any understanding we had about a joint study, and it was then carried as a study by these economists, Drs. Clark and Burns, without the joint cooperation of the Federal Trade Commission.

Q. What do you base your understanding on in that respect?

A. As I recall it now, it was conversations that Mr. John Treanor had with members of the Federal Trade Commission.

Q. You did not participate in those, did you?

A. No, I did not participate in those, but in conversations, subsequent conversations with him I understood that the Federal Trade Commission had withdrawn their cooperation or their joint efforts in the matter.

Q. And were to have nothing more to do with it?

38544 A. No, I did not understand that the Federal Trade Commission was to have nothing more to do with it. As I understand that, all of this was to be handled with a certain amount of cooperation from the Federal Trade Commission. I did not know that they had-

By Mr. MacIntyre:

Q. What did you mean by the word "withdraw" of the cooperation you just referred to?

A. Well, as I say, at first it was my understanding that it was to be a joint study by economists of the Federal Trade Commission and Drs. Clark and Burns, and that later the Federal Trade Commission withdrew the direct cooperation of their economists in this, and the study was simply to be made by Drs. Clark and Burns and submitted, and so forth, and handled, in so far as they could, in cooperation with the Federal Trade Commission.

Q. Do you know of anything of any move that Professors Clark and Burns ever undertook to submit anything that they prepared to the Federal Trade Commission subsequent to that?

A. No, not of my own knowledge, I do not know of anything that they did after the submittal of the questionnaires.

By Mr. MacIntyre:

Q. Now, I call your attention to Commission's Exhibit 913-1-W, that refreshes your memory and recollection that you, as a member of the Marketing and Research Committee, participated in activities subsequent to that date with Professors Clark and Burns in continuation of their work, doesn't it?

A. Subsequent to the date of this exhibit?

Q. No, subsequent to the date of this withdrawal that you have been speaking about.

A. Oh, yes, the Marketing and Research Committee continued to function for some time.

Q. And you along with it?

A. That is correct.

Q. On direct examination, Mr. Brick asked you if your Nazareth mill was a base point; do you recall?

A. Yes.

Q. I believe you replied that it was not.

A. As I recall—

Mr. Brick: That is not his testimony, Mr. MacIntyre. You know that.

Trial Examiner Norwood: Ask him what his reply was.

By Mr. MacIntyre:

Q. What was your reply?

A. As I recall, I replied that for all practical purposes it was a base point because there was another mill operated by the Lone Star Cement Company at that point who had a base on their mill, and we have from our mill in Nazareth the same rates as the Lone Star Company has from their mill, and while we have never changed a base at our Nazareth mill, to all practical purposes we do have a base there. It is just obvious that since the other mill has a base, it practically puts a base on our mill.

Q. Does the Nazareth mill of the Lone Star have any more base than the Edison mill at New Village?

A. Yes. I do not know of any base at the New Village mill.

8547 Q. Isn't it the fact that these rates from all these Lehigh Valley mills are figured from Northampton, just as you testified on direct?

A. I did not testify to that.

Q. My understanding of your testimony,—that is, to points outside of the Valley.

A. That is correct.

Q. Well, for that purpose, this one mill is no more a base point than another one?

A. Outside of the area where the so-called short haul rates apply, where each mill is figured on its own mileage, up to a certain distance between twenty and thirty miles, then the rates from all the mills in the Lehigh Valley are the same, and to all practical purposes there is a base on each one.

Q. It is your testimony within that area the Nazareth mill of the Lone Star Company is a basing point; is that correct?

A. That is correct.

Q. And no other mill?

A. No, no. There are several base mills in the Lehigh Valley.

Q. From which prices are figured?

A. Yes.

Q. For delivery in the Lehigh Valley?

A. Yes.

Q. And yet they all get the same price?

A. I do not know what they get. I do not know

8548 what price they get.

Q. I would like for you to explain, Mr. Browder, the testimony you gave on direct to the effect that for deliveries within the Valley, a figuring point was used plus freight to the destinations involved within that area, tell us what figuring point and exactly how it worked?

A. I do not recall the exact testimony you have in mind, Mr. MacIntyre. I can explain this, though, that in the Lehigh Valley district, with the checking that we have done on the prices we have found in that territory, that base mills are located at Northampton and Nazareth and Siegfried and Evansville, and operate within the district and outside of the short haul district.

Q. Are the freight rates to points within that district

any different from those points we have just named mill points?

A. To the various destinations, yes.

Q. Within the district?

A. Oh, yes.

Q. What is the difference, if any, in the quoted 3854 delivered prices in the district, Mr. Browder?

A. Why, there is considerable difference. There is one point against another.

Q. Based on what?

A. Based on the price base at the — one of those mills, plus the freight rate out to the destination which you happen to be talking about. I do not know just what destination you are talking about now.

Q. Let us take Phillipsburg. What base controls Phillipsburg, N. J.?

A. I cannot say offhand which one would control it.

Q. What base controls Allentown?

A. I cannot say, but I should think it would be Northampton.

Q. Wouldn't Northampton also control Phillipsburg?

A. I am not sure, but I would, as a guess, if you would like for me to guess, I would guess that Nazareth would.

Q. Are the price bases the same at Nazareth and Northampton?

A. Yes.

Q. $1.65?

A. Yes. I think the rate from Nazareth to Phillipsburg would be lower than from Northampton.

Q. Now, I believe you told us on your direct examination that this group rate arrangement on the Lehigh Valley to destinations beyond that territory was, as is shown on Respondents' Exhibit, for identification, 2895, 38550 that is the Lehigh Valley, map, and that it had grown out of a proceeding which I believed you term I. C. C. Docket 15380. Do you recall?

A. No, sir; I do not.

Q. Well, what is your testimony on that?

A. The freight rates from the Lehigh Valley district?

Q. To points beyond the district in the direction of New York, New England?

A. Are not based on any proceeding before the Interstate Commerce Commission.

Q. What is it based on?

A. It was based on arrangement made between individual railroads and the cement shippers in that whole territory, in the Eastern Trunk Line Territory.

Q. I understand your testimony on direct to be that it was involved in a hearing before the I. C. C.

A. No, sir; I did not testify.

Q. In Docket 1538—

A. No. The docket you have reference to, 15806—I do not know of such docket number as you call, but 15806 was the Southern adjustment, not the Eastern adjustment.

Q. Was the Southern adjustment similar to the Lehigh Valley and Hudson adjustments?

A. No, no. It was entirely different territory.

Q. Well, I know, but as to the method of handling—

A. No. The method was entirely different.

28551 Q. In what respects?

A. Well, the only way I can explain that is to explain to you the basis that was put in in each territory. Do you want to go back over that again?

Q. You have given us the factual basis, Mr. Browder. I am asking you now about the difference in methods in handling it, in arriving at the basis.

A. Why, the scale of rates which the Commission fixed in the southern territory was not the same as the scale of rates which was fixed in the East.

Q. We realize the rates are not the same, but I am asking you now about the methods of negotiation and discussion, and so on.

A. Well, the methods are that the rates in the South, except in a few specific instances where there are routing restrictions, apply via any route, which is not more than 25 percent circuitous.

Q. I think you still—just a moment; I think you still misunderstand my question, Mr. Browder.

A. I think I must.

Q. I am not asking about the details of the rates. I am talking now about the method used by the interested parties in attempting to work out the rates that they would like to apply, were they any different than the methods as to the Lehigh Valley?

28552 A. Yes, they were different.

Q. In what respect?

A. In the South, all of the territory in the South, as far as the adjustment goes, is based on the mileage scale

ordered in by the Commission in Docket 15806. In the East, part of the rates were based on the mileage scale, and part—

Trial Examiner Norwood: Now, tell him, was it the same kind of a proceeding?

By Mr. MacIntyre:

Q. That is, as to conferences between shippers and carriers and so on?

A. No, it was not the same kind of a proceeding at all.

Q. What were the differences in that respect?

A. One was a formal hearing before the Interstate Commerce Commission and the other was an informal conference between railroad officials and traffic representatives of cement companies.

Q. Well, now, taking it up to the point that it reached the formal stage before the I. C. C., were there any differences in the proceeding as to the negotiations?

Mr. Brick: What proceedings, Mr. MacIntyre?

Trial Examiner Norwood: He understands that. That is perfectly clear.

A. The only proceedings that were taken to the Interstate Commerce Commission were in the South, and
3853 prior to the I. C. C. proceedings there were informal conferences between the railroad officials in the South and the traffic representatives of cement companies.

By Mr. MacIntyre:

Q. And that occurred in the Hudson matter, the Southern matter, and the Lehigh Valley matter, didn't it, as to the conferences between shippers and the carriers?

A. That is correct.

Q. And there was no difference as to the manner in which those conferences were held in either instance, were there?

A. No material difference, no. They talked about different matters, and all that.

Q. That is what I, of course, understood it would be about different matters, but the proceedings and the nature of them would be the same up to that point?

A. Yes. There were conferences between the railroads and shippers' representatives.

Q. That is up to the time that there were any submission of applications to the I. C. C., and so on, they were the same?

A. That is correct.

Q. And I believe you have given the Southern docket, I. C. C. Docket number as 15806, and the Hudson Docket number as 18112.

A. No. The 18112 applied only to New England and not to the Eastern Trunk Line territory at all.

Q. But to New England from Hudson?

38554 A. From the Lehigh Valley district and from the Hudson River district.

Q. But you have given us those numbers. I just wanted to be sure that we had them correct.

A. Yes, sir.

Q. Now, you stated that after this adjustment of rates in the Trunk Line and Northeastern territory from Lehigh Valley and the Hudson Valley, your company, the Pennsylvania-Dixie, found it less difficult to ship into New England from Lehigh Valley; do you recollect?

A. That is correct.

Q. Now, will you explain to us just in what manner that it became less difficult?

A. Why, our rate situation was more uniform throughout the territory, and the nets that we received varied considerably from what it had in the past, and this whole harmonious adjustment over the territory made is considerably easier for us to solicit and receive and ship business than we had been able to do in the past.

Q. That is because of some mills that were located closer to the shipping, to the destination points, and which had previously enjoyed lower freight rates no longer enjoyed lower freight rates than you and your company which had mills located at greater distances; is that correct?

A. No, I would not say that, Mr. MacIntyre?

38555 Q. Well, what is the difference?

A. They still probably had lower rates, but the spread between the rates was probably not as great.

Q. More or less equalized, then?

A. Yes. In other words the spread as between the rates was not as great.

Q. And one of the difficulties that was removed with respect to this grouping arrangement from the Lehigh Valley district as to the uniformity of rates after getting beyond this twenty or thirty mile limit was the figuring of freight rates?

A. No, that is not correct.

Q. Is it more difficult to figure freight rates outside of the Lehigh Valley now than before the grouping?

A. No—I mean that they had the grouping before that.

Q. But they did not have the grouping prior to 1925, did they?

A. Oh, yes, yes. The grouping in the Lehigh Valley district has been in effect for years.

Q. For how many?

A. When I first knew anything about it, the rates from the Lehigh Valley district were grouped since 1923.

Q. Previous to that?

A. I cannot say previous to 1923.

Q. Well, before they were grouped it was less simple to figure freight rates to destination points outside, wasn't it?

38556 A. I do not know when they were not grouped, Mr. MacIntyre. I do not know. I cannot answer that.

Q. Well, you, as a traffic manager, can answer the question I have just asked, can't you?

A. Do you mean this is a hypothetical question, if the rates were not grouped would it be easier or harder to figure rates?

Q. Well, you have had practical experience with it with respect to grouping of rates from Birmingham, and can you answer from the basis of that experience?

Mr. Brick: I object: What does the question apply to now,—Lehigh Valley or Birmingham.

A. The Birmingham mills have been grouped so far back as I can remember, since 1914.

By Mr. MacIntyre:

Q. Well, is it less difficult or more difficult to figure group rates than individual rates from a series of mills to a particular destination, Mr. Browder?

38557. A. Of course, it is a simpler matter to look up one rate that applies from twenty points, than to look up twenty different rates from twenty points of origin.

By Mr. MacIntyre:

Q. It is easier to quote the same price by six or eight or ten people when that is the case than when it is not the case, isn't it?

A. No, I do not know that it is any easier in quoting, whether that would be true or not; after you look up the rates it does not make any difference one way or the other; you look up the rates.

By Mr. MacIntyre:

Q. It is easier when you have to look up only one rate instead of twenty, when you attempt to quote a price, isn't it?

A. That is correct.

Q. So if you wanted to quote the same price as your competitors at a particular destination, and had to look up only one instead of twenty, it would be easier to quote the same price?

A. We want to quote the lower price, not necessarily the same.

Q. You would not want to quote higher?

A. Not if we knew it.

Q. So it means the same price when you say "lowest"?

A. As low as the lowest.

Q. But not higher than the lowest?

A. That is right; no, we won't quote higher if we want the business.

Q. And not lower than the lowest?

A. Sometimes.

Q. Can you cite me an instance where you have deliberately quoted lower than your competitors at a particular destination on your published prices?

A. I cannot recall an instance right now on the published prices, no.

Q. On your direct testimony you mentioned the National Freight Rate Bureau Service in Washington, and spoke of Mr. Young that operated that.

A. Yes.

Q. Mr. Walter Young.

A. That is correct.

Q. He was formerly the traffic manager of the Atlas Company, which is now a part of the Universal Atlas Cement Company; is that correct?

A. That is correct.

Q. And I think you spoke of the Nazareth Cement Freight Rate Bureau also.

A. I think the name of it was the Nazareth Traffic Bureau.

Q. That was operated by a man by the name of Mr. Riegart, wasn't it?

A. As I recall it, yes.

Q. And he is the Mr. Riegart that now operates the Bethlehem Traffic Bureau of The Cement Institute?

A. That is correct.

Q. And he was also traffic manager of the Nazareth Cement Company, one of the Respondents here, is that correct?

A. I do not know that, Mr. MacIntyre.

Q. He aided you in the preparation of The Cement Institute freight rate books, didn't he?

A. I do not know just how to answer that, Mr. MacIntyre. He aided us and we aided him, as far as we could.

Q. Collaborated, then, on the preparation of the books?

A. Yes, for The Cement Institute which issued the books.

Q. I believe on direct you stated that you requested the traffic managers of a number of your competitors in the Southeastern territory to compile freight rate books for their respective States, at the time The Cement Institute freight rate service was inaugurated; do you recall that?

A. Not their respective States, but for a State, yes.

Q. Each one of them was to prepare one, say; a State.

A. That is correct.

3560 Q. Mr. Browder, can you conceive that it would be any more expensive for one of those traffic managers to prepare a book for a State in which he operated for himself than it would be for him to prepare it for The Cement Institute, for the use by all of his competitors?

A. Why, no, if he prepared it, it is prepared.

Q. It would cost him just as much to do it for the Institute as for himself?

A. That is correct.

Mr. Brick: Now, are you applying that to one State or several States, Mr. MacIntyre? That is misleading.

Mr. MacIntyre: Well, for such State as he worked out. I think the question and answer are clear.

By Mr. MacIntyre:

Q. I believe you told on direct examination that you worked on the committee with Mr. Gubernator that prepared The Cement Institute freight rate books.

A. No, not exactly that. I worked as a sub-chairman of a committee in the Southeast in connection with the southeastern books. I did not work directly with Mr. Gubernator on the committee.

Q. As chairman of the Southeastern—as chairman of the sub committee for the Southeastern district, you collaborated with Mr. Gubernator on the preparation of the books for all States?

A. No, only for the Southeast.

38561 Q. Well, I know, but you aided him in his general work because he was in the preparation of books for all States?

A. No, Mr. MacIntyre, I had nothing to do with the books in the other States, only the Southeast.

Q. Well, he informed you in connection with work that you did do as to the scope of the rate bureau work; that is, that was expected to be undertaken?

A. No. At that time I did not—I do not recall now receiving any such information from Gubernator.

Q. You talked with him about it?

A. No. I only received one or two letters from Mr. Gubernator. There was no discussion. I never saw Mr. Gubernator during that time or had any discussion with him at all.

Q. Well, when he asked you to have these southeastern books prepared, he told you something about the headline point, and you discussed with him the matter of putting in headline points, didn't you?

A. That is right; for the Southeastern books.

Q. And now I call your attention to a statement appearing in the memorandum identified by Mr. Gubernator concerning the scope of that work on Commission's Exhibit 1139-C, the statement as follows: "However, the scope of the work as to origin points is a matter that should be determined by members of The Cement Institute."

That is the understanding you received from Mr.
38562 Gubernator, isn't it?

A. No. I do not recall that paragraph right now, but took in all of the possible points that could ship into the territory.

Q. What contrary understanding to that that I have just read did you receive from Mr. Gubernator?

A. I do not—so far as the books that I had anything to do with were concerned, it did not make any difference whether they were members of The Cement Institute or not. All producing points were put in those books as headline points.

Q. Did you have anything to do with the preparation of the Maryland-West Viriginia books?

A. No.

Q. Tennessee?

A. Yes.

Q. Did you include all the shipping points in Tennessee?

A. All that I thought could possibly ship in there under the rates that were in effect at that time, yes.

Q. Do you recall your testimony on direct examination that the principal advantage of the use of The Cement Institute books over the prior ones is that they are more up to date and in wider use?

A. No. I said that they were kept up to date in a better manner than the previous books were. I do not know that I said anything about the wider use.

38563 Q. What is your testimony on that last point now, is it an advantage or disadvantage to your company that the books are in wider use among its competitors?

A. Oh, I presume that if the wider the books are used, if any error might appear in the books there would be more people to catch it than if one particular person were using the books.

Q. So it is an advantage to your company in your estimation that the books are in wider use among its competitors?

A. To the extent that the books are probably more correct, yes.

Q. Well, would you say that same thing is true with respect to all purposes for which your company uses the books?

A. No, I do not know of any other purpose that there would be.

Q. Well, the same thing would apply to all purposes whatever those purposes are, wouldn't it, that you just gave?

A. That the freight rates in the books are correct, yes; I think that if the freight rates in the books are correct they are better for all purposes that they are used for, whatever the purpose might be.

Q. Do you recall your testimony on direct to the effect that in 10 years you had found only 10 errors in The Cement Institute freight rate books?

A. No. I did not intend to testify that way if I

38564 did, Mr. MacIntyre.

Q. Well, will you tell us now what you did intend to testify to in that respect?

A. I said that I had only found errors in the freight

rate books on a few occasions, and I would estimate that it was only about ten times. In other words, that I took up with The Cement Institute for correction in the book.

Q. You took it up with the Institute ten times?

A. Yes.

Q. Is that what you mean to say?

A. Yes.

Q. You did not mean to say, then, that you had not found but ten errors; is that correct?

A. No. I do not recall how many errors were involved in each of the instances; sometimes it might involve a freight rate base point rate that involved several destinations.

Q. Is it your testimony now that you informed The Cement Institute every time that you found an error?

A. Yes.

Q. What books of The Cement Institute have you looked through for the purpose of determining whether they contained errors?

A. I have not checked through from cover to cover any books issued by the Institute.

Q. Just how deeply have you gone into them for the purpose of determining whether they are erroneous in any respect?

38565 A. Why, the only time I have done any particular checking was in connection with projects when they came up; I would sometimes examine the tariffs against the freight rate books at those particular points, what States they were in, and how often I have done that I cannot say, but I have never made a cover-to-cover check of the freight rate books.

Q. What percent of the total number of points in those books will you estimate that you have checked?

A. Oh, it would be hard to say, probably—

Q. Five percent?

A. No, not that many. Maybe a thousand, or five thousand; I do not know how many points in the course of years that I have checked. It would be very hard to estimate it. In some of the books I presume there are as many as 20,000 rates.

Q. Mr. Browder, if the record shows that for a period of more than three years during the time that The Cement Institute's freight rate books were being issued the railroad had in effect in a particular area in which your com-

pany does business different rates between two particular points over the same road for different sized cars, and The Cement Institute freight rate book covering the haul between those two particular points did not show anything other than the highest rate as to the sized car, would you say that the rate shown there is the correct rate in view of the statement that The Cement Institute puts out to the effect that the rates shown in the book are the low-
38566 est applicable rate between the points shown?

A. It is my understanding that the rates in the rate book are supposed to be the lowest rate between applicable points.

Q. On any sized car; is that correct?

A. I do not know that there is any exception to that.

Q. Now, I call your attention to Commission's Exhibit 1110-H, and 3016-2-I, and ask you to state where you can find in that freight rate book of The Cement Institute, or any of its correction sheets issued between the dates of the issuance of the book and the date of the issuance of the correction sheets of February 5, 1937, being Commission's Exhibit 3016-2-I, any showing of differences in freight rates applying on differences in sizes of cars?

Mr. Brick: Is the witness, Mr. MacIntyre, to read through all that book?

The Witness: Will you read that question again, please?

(Question read.)

(The witness examines the book.)

By Mr. MacIntyre:

Q. Do you see any footnotes in the book anywheres?

A. I have not yet. I am down to page 26 now, Mr. MacIntyre. I have not seen any, so far.

Q. Don't you have general knowledge on the point that The Cement Institute did not, prior to February 5,
38567 1937, issue a correction sheet showing the application of different rates for different sized cars in that territory, Mr. Browder?

A. No, Mr. MacIntyre. We do not do business in Kansas at all, except in a very small part of it, and I do not know that there are any such rates or any such information in the rate books right now.

Q. Well, the record does show, Mr. Browder, that you do do considerable business in Kansas City from your Des Moines mill. Calling your attention to Commission's Ex-

hibit 2794, sheets 22, 29, 30, 76, 86, 87, 96, 124, and 136, as to shipments from you in that territory in one month.

A. I said except as to a small area which includes Kansas City, in that statement.

Q. But the rates in the book apply to Kansas City.

A. Yes, but I have not previously examined all of these rates, and I cannot answer your question until I do go through and see. You asked me as to any instance in the book, and I have to go through the book to tell you.

38568 Q. Mr. Browder, have you examined the correction sheets issued for the State of Kansas by The Cement Institute?

A. Yes.

Q. From April, 1934, to February 5, 1937?

A. Yes.

Q. Being Commission's Exhibit 3016-A to -H?

A. Yes.

Q. Correction sheets 1 to 35.

A. That is correct.

38569 Q. Do you find in those anything that you can construe as a showing of differences in rates applying on shipments of different sizes of cars?

A. Only in correction sheet No. 35, which is Commission's Exhibit 3016-H.

Q. And what date did it state that those rates became effective?

A. Effective February 5, 1937.

Q. Now, I am talking about the date on which the correction sheets states that those rates became effective, Mr. Browder. What does that correction sheet say about that,—doesn't it say "effective at once"?

A. It is issued February 5, 1937, and says "Effective at once," which would indicate that they are effective on February 5, 1937.

Q. It does not say that they were effective prior to that date?

A. No.

Q. Now, if the record shows that from 1934 to 1937 different rates did apply for shipments of different sizes of cars into the State of Kansas, what would you say about the correctness or incorrectness of The Cement Institute freight rate books, Commission's Exhibit 1110-H and the correction sheets supplementing it, Commission's Exhibit 3016-A to -H?

A. The additional rate for different minimum
38570 weights should have been shown, I think, at the time they were issued by the railroads.

Q. And in so far as the heavier cars resulted in lower rates; that is, cars heavier than 50,000 pounds, why, the rates in The Cement Institute freight rate books, and supplements, were incorrect; is that correct?

A. I have not checked to see whether that was the 50,000 or what rate that was in the rate book, but can check it very quickly.

Q. All right.

(There was a short pause while the witness examined the book.)

A. At many of the points the lowest rate is shown in the rate book.

Q. For 50,000-pound cars?

A. For the 50,000-pound cars, yes.

Q. What about the 80,000-pound cars?

(There was a short pause while the witness examined the book.)

Q. Well, instead of checking all of them, will you look at Kansas City at the end of that correction sheet and tell me whether or not the 80,000-pound rate is considerably lower than the 50,000?

(The witness examined the book.)

38571 A. The correction sheet shows a rate of 4½ cents for 80,000 pounds and 6½ cents for 50,000 pounds, and the rate shown in the rate book is 4½ cents, which is the lower.

By Mr. Brick:

Q. On the 80,000-pound car?

A. On the 80,000-pound car.

Q. But suppose a man wanted to ship a sixty or fifty thousand pound car, the freight rate book and its supplements prior to February 5, 1937, would not have shown the rate that would have applied; does it?

A. No, he would have gone to the tariff if that rate was in effect at that time.

Q. So in so far as the freight rate book of The Cement Institute Commission's Exhibit 1110-H, states that it applies on 50,000-pound cars, or is taken as applying on 50,000 pound cars, it is incorrect?

A. I do not think it is understood to apply on 50,000-pound cars; the rate book is to apply on any sized cars

shipped, and should contain the lowest [illegible] applicable between any two points.

Q. Well, what do you take to mean the statement
38572 that appears in The Cement Institute freight rate books to the effect that the rates apply on 50,000-pound shipments?

A. I do not think it says that, Mr. MacIntyre.

Q. If it does appear in there, what would you say is meant by it?

A. What it does say is that the minimum weight is 50,000 pounds. In other words, that is the smallest amount you can ship, but not the largest. We ship hundred-thousand pound cars every day on those rates.

Q. To what extent, Mr. Browder, in your experience do different rates apply on different-sized cars?

A. It is very infrequent that they apply on different sized cars. You have them occasionally applying on different sized cars.

Q. In various States?

A. Yes, all over the country.

Q. Can you explain why that for a period of three years The Cement Institute did not issue a supplement to its freight rate book showing the difference in this rate on different sized cars?

A. I do not know.

Q. On direct examination, Mr. Browder, you stated that you had three assistants in your traffic department. Does that include stenographers and clerks?

A. No. That is my actual assistants.

38573 Q. How many people do you have in your traffic department, including stenographers, clerks, traffic manager, assistants, and so on?

A. Besides myself and the three assistants referred to, I have part time stenographic force in the New York office, the Chattanooga office, and the Nazareth office where my assistants are located.

Q. Well, can you give us an over-all statement as to the approximate number you have working in traffic departments, including clerks and stenographers?

A. Yes. I have myself and three assistants, and one and one-half stenographers.

Q. In all the office?

A. That is correct.

Q. And when you add shipping to that, how many does it include?

A. The shipping department is not under the traffic department.

Q. Well, I am talking about shipping and traffic now, Mr. Browder.

A. In the shipping department there are probably about thirty.

Q. So the shipping and traffic departments have about thirty or thirty-five or thirty-six people combined?

A. I think that is about correct.

38574 Q. Now, on this question of fractions, of dropping the fractions, I believe you stated that it was the policy of the railroads to drop fractions?

A. In publishing rates, yes, in some instances.

Q. Well, when they compute the freight charge on a shipment of a car of cement, the only fraction that they drop is the fraction of the last cent in the total of the car; isn't that correct?

A. Yes. I said that they dropped the fractions in publishing the rate, not in applying them. There is no fraction dropped in applying them except the last decimal point; that is, if it is less than half a cent.

Q. But the cement industry, including your company, drops fractions in computing freight charges in terms of cents per barrel for quotation purposes?

A. That is right.

Q. That is something new and different from anything you have ever known the railroads to undertake isn't it?

A. No, I think they do the same thing.

Q. Did you ever know of the railroads to drop fractions in the computation of any charges in terms of cents per barrel on cement?

A. I do not know of any rates on cement being published per barrel.

Q. Or applied in terms of cents per barrel?

38575 A. No. The rates generally apply either in cents per ton or dollars and cents per ton, or cents per hundred pounds.

Q. So the dropping of fractions in converting the freight charges in terms of cents per barrel by the cement industry is something to your knowledge that has never been done by the railroads; is that correct?

A. No, they do the same thing in publishing rates.

Q. I am talking about in converting it in terms of cents per barrel.

A. The railroads do not convert it, Mr. MacIntyre.

Q. So they never have dropped fractions in converting rates in terms of cents per barrel, have they?

A. So far as I know, they do not convert the rates at all.

Q. So what you do in the cement industry in that respect is something, to your knowledge, the railroads have never done; is that correct?

A. They have no conversion; if they do not convert, of course they do not drop anything.

Trial Examiner Norwood: I think he has made that clear.

Do they drop the fractions in computing the actual freight on hundredweight?

The Witness: In publishing the rates, they do; yes, sir; in some instances; not in all instances, but in some instances.

38576 Mr. MacIntyre: If Your Honor please, the thing I am attempting to clear up was this witness' direct testimony, that they dropped fractions. Respondents' Counsel are attempting to have it implied from that that they do that thing in converting freight charges in terms of per barrel. I want to clear that up.

Trial Examiner Norwood: He has testified that the railroad makes no such conversions, so if they make no such conversions they have no practice in that respect in any way whatsoever.

Mr. MacIntyre: I just want to know if that is the testimony. I am trying to clarify it.

Trial Examiner Norwood: He said that.

Is that correct?

The Witness: Except in publishing of the rates by the railroads.

Trial Examiner Norwood: Do they publish in barrel?

The Witness: No, they publish per hundred pounds and drop fractions less than half a cent, and carry the figure over to the next full number if it is a half a cent or greater in publishing rates.

Trial Examiner Norwood: Do the railroads issue any sort of rates or information which involves the conversion from hundredweight into barrels?

The Witness: No, they have no conversion at all.

38577 They do not convert to barrels.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Then, isn't it correct, Mr. Browder, that the first information you ever had concerning the use by anyone of converting freight charges in terms of cents per barrel, and the dropping of fractions in that respect, was the practice in the cement industry?

A. I do not know that it was the first I ever heard of it, but I learned of it when I got in the cement industry that that was done.

Q. Can you tell us of any you had prior to that?

A. No, I say I do not know whether it was the first or not; but I do know I learned of it in the cement business.

Q. Now, at page 38249 in your testimony of May 3, you told Mr. Brick about discussing the use of a non-diversion stamp at a meeting of the transportation committee of the Portland Cement Association.

Do you recall your testimony on that?

A. Yes.

Q. In that testimony were you referring to the committee that is referred to in Commission's Exhibit 749-VV?

A. Yes; I would understand that that is referred to in that letter.

Q. In addition to the conference that is referred 38578 to in that letter, Mr. Browder, is it your testimony that you had no prior conferences with Mr. Gubernator of the Lehigh Company on that subject?

A. I do not recall any conversation with him prior to that, no.

Q. Is it your testimony that you did not have, or is it your testimony that you just do not recall?

A. I do not recall whether I testified about having a particular conversation with Mr. Gubernator, but I—so far as I recall, I did not have any conversation with Mr. Gubernator; do not recall testifying about it.

Q. Well, is it your testimony now that you did not prior to May 1935, discuss this subject with officials of railways?

A. No, I do not think I discussed it with anybody prior to May, 1935; railroads or anybody else. I did not learn about it until early in May some time.

Q. Is it your testimony, Mr. Browder, that you did not discuss the subject of diversions of cement in transit with railway officials and with any of your competitors prior to May, 1935?

A. Oh, I though you meant the stamp on the bill of lading that was referred to in the other matter, but I have discussed diversions with railroads ever since I have been in the cement industry, yes.

Q. And with your competitors?

38579 A. I do not recall any particular conversation, buy may have from time to time, yes.

Q. Prior to 1935, is that correct?

A. Yes, yes.

Q. Now, Mr. Brick introduced Respondents' Exhibit 2907-A to Z-9, the contract forms of the Pennsylvania-Dixie Cement Company, and called your attention to a provision that prohibits diversions in transit; do you recall that?

A. Just what exhibit was that? I do not recall, in what contract?

Q. Contract forms, specific jobs; you offered them as the forms of the company.

A. Oh, our own contracts?

Q. Yes.

A. The clause does not prohibit—I mean, it does not prevent it. It is supposed to prevent it, but it does not. There is a clause in there about diversions which is supposed to prevent it.

Q. To the effect that the buyer should not divert it?

A. That is correct.

Q. But do you know of the use of such a clause in any other contract used by the Penn-Dixie Company aside from its specific job contracts?

A. I think it is on our salesmen's order blanks that we take orders on, printed on the back of it, I believe.

38580 Q. Does anyone see those order blanks except your salesmen and the people in your office when a salesman fills it out he sends it out?

A. He gives one to the customer. The customer is supposed to sign it. It is made up in three copies. He keeps one.

Q. What percentage of your orders are accepted on salesmen order blanks?

A. Oh, a very small proportion.

Q. What percentage of your total business is involved in specific job contracts?

A. A very large proportion.

Q. Thirty percent?

A. Oh, I would say 60 percent, or better, on contracts.

Q. On specific job contracts?

A. Yes; we have about 60 percent of our business on contracts, I think. I have never checked that, but that would be just the best of my judgment on it.

Q. Combining these specific job contracts and these jobs on salesmen's order blanks, what percentage of these would be of your total business?

A. I don't know. I couldn't tell you.

Q. As much as 65 percent?

A. Probably.

Q. But you think it would not exceed that by any appreciable amount?

38581 A. As I say, I would not have any idea of the exact amount, but I would say that that would be a conservative estimate.

Q. What percentage of your business would you say, Mr. Browder, is secured just through telephone calls from your customers, as to their so-called open market business or warehouse?

A. It would be very hard to estimate that. It would be just a pure guess on my part.

Q. As much as one-third of your business?

A. Well, I don't think so. I would say five percent, maybe.

Q. Do your customers call for only five percent of their business by telephone, or write in without having your salesmen call on them?

A. You said just telephone calls. If they write in, that would increase the amount considerably, if you put in telegrams and letters.

Q. Would the two combined amount to one-third of the total business?

A. I do not think all of our total business is much over 30 percent to dealers.

Q. That is on their warehouse or open market business?

A. That is right. The rest is under some kind of contract.

Q. What part of that do they write for or call in for, without the salesmen having left an order blank?

A. What part of the 30 percent?

38582 Q. Yes.

A. I would say 90 percent of that comes in without being on the salesmen's order blanks. The salesman takes very few direct orders.

Q. Now, during your direct examination you told Mr. Brick that you felt that certain rates shown, that is, special railway rates, shown on Commission's Exhibit 406-A and B, between certain points applicable on T.V.A. shipments were incorrect; do you recall?

A. Yes.

38585 Q. Mr. Browder, can you tell me what the correct rate was; that is, the special rail rate on July 18, 1934, between the points that I give you; that is, to Sheffield, Ala.:

Phoenix, Ala.

A. Phoenixville.

Q. Phoenixville.

A. Eight cents.

Q. On that date?

A. On July 11, it was 8 cents.

Q. North Birmingham.

A. It was 8 cents.

Q. Leeds, Ala.

A. Leeds, Ala., was—I would like to make this statement right here, as to North Birmingham or Leeds. If my statement as to North Birmingham, is correct, then

38586 the Leeds rate is 13 cents, not 8½ cents, as shown on that statement.

Q. How do you know it is 13 cents?

A. I know that is the rate from Leeds to Sheffield. That was the commercial rate at that time. I had quite a lot of dealings in connection with it.

Q. Did you check it since 1934?

A. No.

Q. You just have a specific memory as to the 13-cent rate over these years?

A. Yes, sir.

Q. What was the rate from Boyles to that point as of that date?

A. As of that date, the rate was 12½ cents per hundred pounds.

Q. Chattanooga, Tenn.

A. It was 13½ cents a hundred pounds, Chattanooga.

Q. Cowan, Tenn.

A. Cowan had a special rate at that time of 8 cents per hundred pounds.

Q. Nashville, Tenn.

A. The Nashville rate was 12½ cents per hundred pounds.

Q. Richard City, Tenn.?

A. The rate was 12½ cents per hundred pounds at that time.

Q. Now, will you give us what you consider to be the correct rates to Coal Creek from the following points:

38587 Phoenixville, Ala.

A. My recollection is it was 15½ cents.

Q. North Birmingham.

A. 15½ cents.

Q. Leeds, Ala.

A. I think Leeds was 16 cents.

Q. Chattanooga, Tenn.?

A. Twelve cents from Chattanooga, Tenn. No, wait a minute—not on that date. It was 9 cents from Chattanooga, Tenn. They had a special rate in effect at that time.

Q. We are talking about special rates now all through.

A. Yes; that is right. The rates I am giving are the rates which were applicable on the Tennessee Valley Authority shipments.

Q. Your special rates applicable on that.

A. Any kind of rates. They are the only rates we had applicable on that movement.

Q. Cowan, Tenn.

A. I don't recall the rate from Cowan there. They had no special rate, however.

38588 Q. What was the rate from Kingsport, Tenn., to Coal Creek on that date—the special rate?

A. 9½ cents, as I recall it.

Q. Knoxville, Tenn.

A. Five cents.

Q. Nashville, Tenn.

38589 A. Nashville—I don't recall the Nashville rate.

Q. Richard City, Tenn.?

A. The rate was 10 cents.

Q. Mr. Browder, you told us what the effect of the establishment of a base at your Kingsport, Tenn., mill was at the time you put it in there, I believe, in 1935. Would you say that same effect would result in the establishment of a base at any of the other mills?

A. No; I don't think so. I think that each separate situation has to be considered on the conditions existing around the mill at that time.

Q. You do not think it would lower the price, just as it did at Kingsport?

A. It might or might not.

Q. I believe you stated that the N. C. & St. L. Railway is now the only customer that buys on a Richard City base from your company.

A. No; I did not say that.

Q. What is your testimony on that point?

A. About the N. C. & St. L.?

Q. Yes.

A. I stated that at a particular time there we did have in at our mill a price base which we used in quotations only with the N. C. & St. L. Railway.

38590 Q. Well, at that time, it was the only customer that bought on that basis; is not that correct?

A. Yes.

Q. And was not because that customer was buying on an f.o.b. mill basis? Is not that the import of your testimony?

A. We did sell them f.o.b. the mill. I did not testify to that, I don't think, but we do sell them f.o.b. the mill.

Q. Well, the only reason they were able to get any benefit that would accrue from giving them a price based on Richard City was the giving of an f.o.b. mill price to them; is not that correct?

A. That is right. We sell them on an f.o.b. mill price.

Q. And other customers would have received a similar benefit if they had bought f.o.b. mill if you had permitted them to do it?

A. No; the price to the commercial customer would have been much higher.

Q. If they had bought f.o.b. the mill on the Richard City base they would have had the same price as the N. C. & St. L. Railway; would they not?

A. No, sir; they certainly would not have.

Q. That was because you would not sell them f.o.b. your mill; is that correct?

A. No.

Q. Well, you did not sell them f.o.b. mill; did you?

38591 A. No; we did not sell them f.o.b. mill. We sold them delivered price at destination.

Q. But you did sell the N. C. & St. L. Railway f.o.b. mill?

A. That is correct.

Q. And for that reason, and only for that reason, the Richard City base apply on sales to them; is not that correct?

A. Only for the N. C. & St. L. Railway. That is correct.

Q. I now show you, Mr. Browder, Commission's Exhibit No. 2148, and ask you to state if you are acquainted with that situation which is explained in those exhibits of that number (handing documents to the witness)?

A. This is on the one exhibit right here; is that it?

Q. Yes.

A. Yes; I am familiar with that.

Q. Now, will you tell us why your company—I believe you wrote the exhibit, did you not?

A. Yes; I wrote that.

Q. Will you please tell us why your company refused to permit the Federal Government to transfer that bill of lading, although the dealer, the Federal Government, and the railroad were all agreeable for it to be done?

A. We did not prevent it from being done at all. We just simply would not be a party to it.

Q. You were informed that the Federal Government and the dealer wanted that cement shipped on a Government bill of lading from your mill.

38592 A. No; we were not informed of that, Mr. MacIntyre.

Q. Will you please look at Exhibit 2148 here, and tell us again whether that refreshes your memory and recollection to the effect that the dealer and the railroad and the Government were all in accord that that be done?

A. There is nothing in this Exhibit 2148 saying that they wanted to ship—the Government wanted to ship from our mill on a land grant or Government bill of lading.

Q. Don't you understand that situation as one where the W.P.A. had secured the agreement of the dealer and the railroad for the use of a Government bill of lading on that shipment from your mill to the point involved?

A. No; I don't understand that at all, Mr. MacIntyre.

38593 *Redirect Examination by Mr. Brick.*

Q. Mr. Browder, Mr. MacIntyre brought to your attention Commission's Exhibits 883-2-G, 2-H, and 2-I. Will you look at them, please (handing exhibits to the witness).

Do the matters represented in those exhibits relate to the requirements of the T.V.A.?

A. Yes.

Q. Do the rates and prices referred to in those exhibits relate to rates and prices which were in effect prior to the bidding or subsequent to the time that the awards were made?

38594 A. They were the rates in effect subsequent to the time of the bidding—the rates and prices.

Q. This correspondence, then, which constitutes this exhibit, took place after the awards were made?

A. That is right.

Q. Did you have any such conferences with your competitors on any of the matters referred to in this correspondence, prior to the time of the submission of your bid?

A. No.

Q. Mr. Rockwell, of the Tennessee Valley Authority, was interested in the matters referred to in these exhibits, was he not?

A. Yes.

Q. And you discussed it with him at his request, did you not?

A. That is correct.

Q. Mr. MacIntyre referred, Mr. Browder, to the existence or non-existence of a diversion clause on your general order blanks, and it is my recollection that you told him you had a diversion clause or a clause relating to non-diversion of shipments on these order blanks. Is that correct?

A. My recollection is that it is on there; yes.

Q. Is that clause also on your quotation form?

A. It is on certain of our quotation forms. Whether it is on all of them or not, I am not sure; but I know

38595 it is on certain quotation forms that we send out.

Q. In your cross-examination you made reference to the National Freight Bureau furnishing freight rates to your company, and to Walter Young. Was he the proprietor of that bureau?

A. Yes.

Q. Did you subscribe to his service?

A. Yes.

Q. Do you know how much you paid for that subscription?

A. Yes.

Q. How much?

A. In the year that we used his service, we paid him $1,074.

Q. Did that cover the service for the entire year?

A. Yes; that covered all the service we got from him, which was during 1929.

Q. And what service did you receive from that Bureau in connection with your subscription?

A. We received certain—freight rate books for a few of the States in which we were then marketing our cement. I do not recall just what the States were, or which books it was at this time.

Q. Did you receive the rates for all of the points included under your subscription?

A. No.

38598 Q. Mr. Browder, in connection with the errors in rates which you found in the Institute freight rate books, and I think in connection with that you mentioned that on approximately ten occasions you advised The Cement Institute of errors you had found in the Institute rate books—do you recall that?

A. Yes.

Q. Did you inform the Institute of all the errors which you found in those rate books?

A. Yes.

38599 Q. As far as your experience is concerned in dealing with the Institute freight rate books, Mr. Browder, were all of the errors which your found limited to the errors which you reported to The Cement Institute?

A. Yes.

Q. And was I correct in understanding that you had occasion to make such reports to The Cement Institute about ten times during the period in which your company has been using the Institute freight rate books?

A. That is correct.

Q. Mr. MacIntyre asked you several questions about various mills in the Lehigh Valley, or, rather, various price bases at mills in the Lehigh Valley, controlling prices at a few points, which were designated, and one of which was Phillipsburg. In connection with your answers to those questions, Mr. Browder, what did you mean, if anything, by any reference to the words or phrase "control of prices"?

A. That the price base at that mill, plus its freight rate, produced the delivered price at that particular point that I had in mind.

38601 *Recross Examination by Mr. MacIntyre.*

Q. Mr. Browder, I believe you told Mr. Brick that this correspondence in this series, Commission's Exhibit 883, concerning your land-grant information, was exchanged between you and your competitors subsequent to your bidding on the T.V.A. Do you recall that?

A. Yes, that is right.

Q. What was the date of your bid?

A. October 15, 1934.

Q. Now, I show you Commission's Exhibit 883-2-K, 2-L, and 2-M, and 2-N (showing the documents to the witness). What is the date that appears on that, both in handwriting in the upper corner and at the end of the exhibit?

A. The date in pencil there is "10-8-34," at the beginning, and there is a typewritten date at the bottom, "10-8-34."

Q. Do you know in whose handwriting that date
38602 appears in the upper right corner of the first page of Commission's Exhibit 863-2-K?

A. No, I do not.

38603 J. ROSS HANAHAN, called as a witness on behalf of Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Leisure.

38605 I held the position of president with the Volun-
teer Portland Cement Company and have other business connections. I am president of the Planters
38606 Fertilizer & Phosphate Company and president of the Carolina Portland Cement Company. I have been president of Volunteer since it was organized in 1927. Volunteer began operation in 1928. I was one of the organizers. The other organizers were Mr. Howell J. Davis of Knoxville and Major Frederick H. Lewis from Charlottsville, Va. Mr. Davis is vice-president, and Mr. Lewis is a director of Volunteer.

38607 Q. Mr. Hanahan, how long have you personally been associated with the manufacture and sale of Portland cement?

A. Since 1900.

Q. With reference to this Carolina Portland Cement Company, how long have you been president of that company?

A. Since 1900.

Q. Did it begin business at that time?

A. It began business in 1900.

Q. Has this Carolina Portland Cement Company, Mr. Hanahan, ever manufactured any cement?

A. No.

Q. What has it done? Has the company continued as a dealer, or what has it done since 1900?

A. The company commenced as a small dealer in Charleston, S. C., but very soon, having spread its business, and having become jobbers of builders' supplies and materials throughout the Southeast, is now confining its business to the retail business—dealer business.

38608

Q. You use the term there "jobber." Just so we will know how you use the term, what distinction do you make between "dealer" and "jobber"?

A. A dealer is an individual or corporation or a partnership that is prepared to serve any locality, in a city or a county or a town by having the facilities for serving the public in that community only. A jobber acts as an agent, sometimes for the manufacturer, but sometimes he buys the material outright and sells it to dealers, contractors, and other buyers of builders' supplies.

Q. How long did the Carolina Portland Cement Company continue as a jobber?

A. It continued as jobbers until during the 1920's.

Q. And what, if you know, has been the business of that company since that time?

A. Since that time they have gradually drifted out of the jobbing business into the retail dealer's business, located in Jacksonville, Fla., and Atlanta, Ga.

Q. What brought about that, if you know?

A. Well, it was brought about largely by the fact that in the Southeast, the territory in which we were operating, the cement plants had been built in that area and they desired to sell their own cement, and not to sell it through jobbers, and we were gradually eliminated from the business. We, however, continued to sell foreign cement in a limited way until recently.

38609

Q. I am not sure whether I asked you a moment ago

whether or not the Carolina Portland Cement Company had any affiliation with any other cement company?

A. No other cement company; the only individual in another company is myself.

Q. Was the Carolina Portland Cement Company ever a member of the Association of Portland Cement Manufacturers?

A. No.

Q. Or of the Portland Cement Association?

A. No.

Q. Or of any other organization of cement manufacturers?

A. No.

Q. And now, since 1900, Mr. Hanahan, have you ever been associated with any other cement manufacturing company than the Volunteer Company?

A. Yes. In 1906, with Major Frederick H. Lewis, who was the father of Charles Lewis, and who was engaged in the manufacture of cement in Virginia, we pioneered
38610 in a cement plant located at Leeds, Ala., the old Standard Portland Cement Company.

Q. I do not think I have asked you about that. Will you tell us about that plant, please?

A. Well, about 1906, having had some contacts with the Carolina Portland Cement Company through the distribution of cement in the southeastern territory, as far as the Mississippi River, I saw that there was an opportunity of locating a plant in the midst of the Southeast territory. Birmingham being a large industrial center, we determined to locate it as close to there as we could find materials suitable. Major Lewis had had great experience in the manufacture of cement, and he determined he would go in with me, and we built a small plant there and finished it in 1907. It was a very small plant, put up under very strange conditions.

Q. Where did you say it was built?

A. At Leeds, Ala.

Q. And now, how long were you president of the Standard Portland Cement Company?

A. Until it sold out in 1919.

Q. During this period from 1903, say, until 1919, was the Standard Portland Cement Company affiliated in any way with any other cement manufacturing company?

A. No.

Q. And during that same period did you have any connection or association with any other cement manufacturing company?

38611 A. No.

Q. Now, Mr. Hanahan, during your connection with the Standard Portland Cement Company, will you tell us whether or not that company associated itself in any way with the National Association of Builders Supplies?

A. No; not within my recollection.

Q. Well, regardless of that, during this period, did the Standard Company take any steps to cooperate with the National Association of Builders Supplies?

A. No.

Q. Will you tell us, Mr. Hanahan, were you or were you not in charge of determining the policies and practices of the Standard Portland Cement Company?

A. Yes; as executive officer, I was. I live in Charleston, but visited Birmingham frequently during the year.

Q. Did the Standard Company during that period market its cement in accordance with any definite marketing policy?

A. They marketed all their cement through the Carolina Portland Cement Company, who acted as agent or jobber.

Q. Through whom was the cement produced by the Standard Company marketed?

A. Through whom was the cement produced?

Q. Through whom was it marketed?

A. Well, it was all marketed by the Carolina Portland Cement Company. It was marketed through the

38612 Carolina Portland Cement Company.

Q. Did the Standard Company dictate the marketing or method of sales policy of the Carolina Portland Cement Company during that period?

A. Yes, to a large extent they cooperated with them in the sale of their cement.

Q. With what mills were you competing, then—well, rather, let me say the Standard Company. With what mills was it competing in, say, 1909 and 1910?

A. I suppose you are referring to local mills?

Q. That is right.

A. For the Southern States at Rockmart, Ga.; at the Demopolis plant of the Alabama Portland Cement Company at Demopolis, and the Dixie Portland Cement Com-

pany, which was building just about the same time that we were, at Richard City, and the Coosa plant located at Ragland, Ala., near Birmingham. They were all built about the same time, except two. The Demopolis plant was built away back in the 90's, and the others in the early 1900's.

Q. Was there competition between those plants at that time, Mr. Hanahan?

A. Not only among those plants, but the Pennsylvania region was shipping down in there and the western plants were shipping into the Southeast.

Q. Are you aware of any arrangement or combination of any kind with respect to competition or lack of
38613 competition among those mills?

A. No, sir.

Q. Was there any time in the early history of the Standard Company that the eastern mills and the western mills shipped into this southeastern territory?

A. Yes; as I stated a while ago, they shipped into the territory, and, to a large extent, they made the price in the early history.

Q. And did these eastern and western mills continue to ship into that territory?

A. They continued until—well, up into the early '20's, when the production in that region was pretty nearly enough to take care of the consumption in the region; but they continued to ship in there for quite a while.

Q. What, if anything, have you to say, Mr. Hanahan, as to your observation as to what caused these mills from other areas to withdraw from that territory?

A. Well, as the mills were located in a territory like Birmingham we supplied—our mill was a very small mill in the beginning, we had very little capital, and it was a high cost mill, and we had to take advantage of the freight from the Pennsylvania mills and the western mills to live, but as we grew a little stronger and as the other mills in there grew a little stronger they forced us by price—forced out the competition from eastern and western mills.

38614 Q. During 1909 and 1910 was the price based on any particular price base?

A. No, there were no particular price bases except the Penn—the Dixie Portland Cement Company, who had its plant at Richard City, and quite a nice plant, quite a large

plant for those days, those pioneer days, why, some prices were made on Richard City.

Q. How long did that continue, please?

A. Well, that continues up until now, the price is—the greater bulk of the prices, however, were based on Pennsylvania mills, and a mill in Virginia, and some of the western mills.

Q. What has been your observation, Mr. Hanahan, if anything, as to whether or not the demand for cement has remained constant or has varied one way or the other?

A. The demand has increased. I suppose you are talking of the same Southeast territory?

Q. Yes.

A. The demand has increased gradually very, very much in that territory.

Q. Have you ever observed any periods of time when the demand would decrease?

A. Seasonal, you mean?

Q. Yes.

A. Well, in the Southeast—no, they use cement through the Southeast very generally. Of course, in the win-
38615 ter months, in the hard winter months there is less use than in the other months, but the prime months of cement use are the summer months.

Q. Was any arrangement of any character ever entered into, to your knowledge, Mr. Hanahan, with reference to the curtailing or cutting down of production?

I am referring, Mr. Wooden, to your Exhibit 3235-Z-69.

A. What period?

Q. Just one second.

Well, to save time, I will just say, Mr. Hanahan, there is a statement made by Mr. Kelly about cutting down the production, and the date is approximately 1909 or 1910.

A. At no time have I ever heard,—in those early days particularly,—have I ever heard about cutting down pro-
duction. Our production is so small that we pro-
38616 duced all we could, and all we could sell.

Q. Do you recall whether or not your company went through the winter of 1909 and 1910 without any slash in cement prices?

A. I think in that period it was a very depressed period, and the mills out west were failing, in Kansas City, and some of them in the East, and some of them right around us, and much distress cement came on the market during that period.

Q. Do your recall, Mr. Hanahan, in any increased activity with respect to obtaining and disseminating statistical information concerning production and shipments about that time?

Mr. Leisure: I am referring, Mr. Wooden, to your Exhibit 3235-Z-73, and the minutes of the meeting of the Association of Portland Cement Manufacturers, December 13 and 14, 1910.

A. I do not remember. The only dissemination of statistics I think in that early day was the Bureau of Mines. We used to send some information to them and they issued a pamphlet in which that information was published as a whole from all the companies.

By Mr. Leisure:

Q. Well, now, in connection with the statistical activity, can you tell us whether or not that was any part of any understanding or arrangement between the Standard Company and any companies?

38617 A. None whatever.

Q. Or does your answer apply, or does it not, as to curtailment of production,—was there any arrangement of any kind?

A. We never curtailed production unless we could not sell it.

Q. In what way, if at all, was that statistical information of any benefit or any help to the Standard Company?

A. Well, it was not very much help to us. We got the Bureau's statistics and saw how many barrels were shipped in a month or in a year. Paving jobs had not come up then.

Q. What has been your personal experience with reference to whether or not it is more or less economical to run your kilns seven days a week?

Mr. Leisure: I am referring, Mr. Wooden, to your Exhibit 3235-Z-75.

A. Well, the kiln is a unit of production in the cement business, and it is not economical to shut it down,—to shut it down at all. Continuous operation is necessary in the business for economical operation. Of course, there are times when you got to shut down, when you have no market and cannot sell your cement.

Mr. Leisure: And still referring to the same exhibit, Mr. Wooden.

By Mr. Leisure:

Q. Did your company at this time enter into any 38618 arrangement with any of its competitors that it would or would not shut down its kilns on Sundays or any particular period?

A. No, sir.

Q. Or for any time?

A. No, sir.

Mr. Leisure: Mr. Wooden, I am going to refer now to your Exhibit 3236-J.

By Mr. Leisure;

Q. Mr. Hanahan, did the Standard Company ever adopt any uniform method of cost accounting; that is, did your company adopt any cost accounting method that was recommended for the industry?

A. No, we had worked very economically and we only adopted our own method of cost accounting, not by detail.

Q. Well, tell us, Mr. Hanahan, is it possible for you in operating the cement companies that you have operated to know with each succeeding day what your cement should sell for?

A. No, it has not been. We could not undertake to do that. Some day it would be mountain high and the next day it would be lower.

Q. Can you tell on any given day or any given sale whether you are making a profit on that sale?

A. No, we must tell on the average.

Q. Yes.

Mr. Leisure: Referring to your Exhibit 3236-K, 38619 Mr. Wooden.

By Mr. Leisure:

Q. Mr. Hanahan, when you were with the Standard Company, did you go over the cost of your company with any other manufacturers, or make any comparisons with them in any way?

A. No, sir.

Q. Now, I confined that question to the Standard Company. I would like to include your present company in the same question. In other words, with the Volunteer, have you ever gone over the costs with other manufacturers or made any comparison with them?

A. We have not. Our secretary-treasurer has not.

We opened the books of the company, you remember, to Price Waterhouse & Company in the T. V. A. matter.

Q. I mean, did you sit down with your competitors?—

A. No.

Q. —in any way for the purpose of comparing these things?

A. No.

Q. Or for the purpose of coming to any understanding or agreement as to any future action regarding it?

A. No.

Q. Referring to your Exhibit 3236-N, Mr. Wooden: Mr. Hanahan, during the period that you have been with the Volunteer Company, has your selling expense been more or less than seven or eight cents a barrel?

38620 Mr. Wooden: Your Honor, that is objected to as irrelevant and immaterial.

Trial Examiner Norwood: Read the question.

Mr. Wooden: The exact costs of any particular company.

(Question read.)

Mr. Leisure: I have no desire to go into it at this time, if Your Honor would entertain a motion to strike Commission's Exhibit 3236-N, which either must be explained or answered or taken from the record, I do not care which.

Mr. Wooden: Let him explain it, but what has that got to do with the Volunteer Company?

Mr. Leisure: Well, I stand on my question as I put it.

Mr. Wooden: That was before the Volunteer Company was organized.

Trial Examiner Norwood: I would like to examine the exhibit if the relevancy of this question is dependent on it.

(Mr. Smith hands some papers to the Trial Examiner.)

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

I shall sustain the objection, and will entertain a motion to strike the paragraph referred to in the exhibit.

38621 Go ahead.

Mr. Leisure: I do so move, Your Honor, at this time.

Trial Examiner Norwood: Yes.

Mr. Wooden: Your Honor, the exhibit to which the motion to strike applies was offered to show that a number of the present Respondents, of whom the Volunteer was not one, had meetings at which they discussed these various

questions, and it was not offered for the purpose of showing that the cost of selling or any particular item of cost was thus and so, as might have been expected in a discussion among those competitors who met together.

Trial Examiner Norwood: Well, does the exhibit show what it was offered for, without the use of that paragraph?

Mr. Wooden: Your Honor, I think this is just an illustration of the setting up of a lot of straw men to knock them down, and Respondents' Counsel very well know that the question of what the cost of selling at the time this meeting was held will never figure in any contention. The only contention that will be made is that they were meeting together to discuss these various questions, and spread before each other the intimate details of their business; and let me emphasize again that the Volunteer Company was not in existence at that time, and therefore this
38622 company had nothing to do with any such thing.

Trial Examiner Norwood: Well, but Counsel does not know what Commission's Counsel is doing. I shall allow his motion, so far as limiting the consideration of that paragraph to the purposes stated there; that is, for the purpose of showing that they did discuss the question, but not for the purpose of showing what the sales costs were.

Mr. Wooden: That is all it was ever intended for.

Trial Examiner Norwood: Yes.

Mr. Wooden: That is perfectly satisfactory.

Mr. Leisure: We have no assurance that some other attorney might not draw a different interpretation. Personally, I did have a different interpretation. I had no idea of what Mr. Wooden intended to use it for. He did not inform us as to how he intended to use it when he offered it.

Trial Examiner Norwood: Go ahead.

Mr. Leisure: Mr. Wooden, so that the record may be clear, and that there may be no possible dispute upon this later, does this statement which you made apply to this Exhibit 3236?

Mr. Wooden: It applies to the paragraph in that Exhibit 3236-N, which relates to a discussion of selling expense.

By Mr. Leisure:

38623 Q. Now, during the time that you were with the Standard Company, did that company have any arrangement with any other manufacturers for fixing the amount of depreciation it would take each year?

A. No, sir.

Q. And during the period that the Volunteer Company has been in existence, has it ever had any such arrangement?

A. That is fixed by the income tax unit.

Q. Mr. Hanahan, do you recall a report that was made by a committee on trade conditions of the old Cement Association?

Mr. Leisure: I am referring to Exhibit 3236-Y, Mr. Wooden.

A. Do I recall any what?

Mr. Leisure: Read it, please.

(Question read.)

A. No, I don't recall any.

By Mr. Leisure:

Q. Well, let me ask you this: Did the Standard Company ever have any arrangement or understanding, or did it or did it not follow the recommendations of that committee?

A. I don't remember the recommendations that the industry was interested in the Southeast at that time. I don't remember any trade conditions.

Q. Was there ever any compulsion brought—

A. None whatever.

38624 Q. (Continuing) —to bear against you or your company?

A. No.

Q. Just how did you consider these recommendations?

A. I think you would have to show me the recommendations before I would remember them.

Q. Well, I do not believe I will take time to do that now.

Will you tell us, now,—coming down to your plant at Knoxville,—what happened there; how did you happen to build that?

A. Well, I had been in the business of distributing—

Mr. Wooden: Pardon me for interrupting, but, Your Honor, it seems to me that that is an entirely unnecessary and immaterial detail.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think that that is going into the economical location, is it not? Objection sustained.

Mr. Leisure: I do not believe that I can properly defend the charges that are made in the complaint without bringing out this "immaterial detail," which Mr. Wooden refers to in this instance. I think it is very important to find the circumstances under which this new competitor enters the field.

Trial Examiner Norwood: I think that we have
38625 discussed that question at length, and it is clear on the record what the situation is. I do not think he can go into that now.

Mr. Leisure: Well, in view of the testimony that is in the record and the testimony that has been offered on behalf of the Commission, I desire to make the following offer of proof:

I offer to prove that this witness, if he were allowed to do so, would testify that there were several reasons for the location of this particular mill at the time and place in question. There was the prospect of several big dams being built there; there were good raw material deposits in sufficient quantity to last a long time, and there was plenty of coal available at a reasonable price. There was also an excellent prospect of cheap electric power; and there was a very small freight advantage in a limited territory around the mill, and its general geographic conditions showed it to be a good central distribution point for a general market.

Trial Examiner Norwood: Proceed.

By Mr. Leisure:

Q. When you were considering whether or not you would locate this Knoxville mill at its present location in the vicinity of Knoxville, did you give any consideration to the existence of the so-called basing-point method of marketing?

38626 A. No; we gave no consideration to it at all.

Q. Did you give any consideration to the freight advantage that you might have in that vicinity, as compared with existing plants?

A. Yes, that is one of the considerations we gave to locating there a small mill. We could not compete, certainly in the beginning, with the larger mills. We would have some advantage.

Q. You told us, I believe, Mr. Hanahan, that the Carolina Portland Cement Company began operating as a small

dealer in building supplies in South Carolina. What did they handle; what materials?

A. Well, they handled all kinds of building materials, like lime, plaster, cement, lumber, nails, roofing, and all kinds of building materials.

Q. And what were your sources of supply of cement, say, from 1900 to 1905?

A. Very largely foreign cement. It would come over in ballast.

Q. Did the Carolina Cement Company distribute the cement of the Standard plant exclusively?

A. Yes.

Q. When you were a small dealer, as you have described, in Charleston, what kind of prices did you obtain: I mean by that, f.o.b. mill or delivered prices?

38627 A. We bought our foreign cement C.I.F.; that is cost insurance and freight, delivered at Charleston, put it in warehouses, and distributed it. When we bought from the eastern mills we frequently bought in ten or fifteen or twenty thousand-ton lots. We brought it down by boat to the ports along the Atlantic and Gulf and distributed it. We bought f.o.b. mill or f.o.b. boat.

Q. I am not just sure about the quantities, Mr. Hanahan.

A. We bought large quantities. Sometimes we bought a hundred thousand barrels to be distributed over—to be taken over a period.

Q. How much was a ship load, on the average, if you know?

A. Well, we brought down five or ten thousand barrels. Five thousand was the usual lot.

Q. What was the nature of the purchase; and I mean by "nature," was it a long-term contract, or what kind of purchase was it?

A. To be taken out over a period of a year; maybe over a few months.

Q. When you were buying f.o.b. mill in these large quantities, will you tell us whether you did or did not make any effort to find out what it was going to cost you at the point where you wanted to use your cement?

A. Yes; we knew what it was going to cost us. We had the water and rail rate to destination.

Q. Well, I am not sure that I have made myself
38628 entirely clear. What I mean is, if you got it f.o.b.

mill price at the Lehigh Valley mills, say, at a few cents lower than from the Virginia Portland Cement Company, did you buy it from the Lehigh Valley?

A. No, we bought it from the one that afforded us the cheapest delivered price at the points where we proposed to sell it.

Q. Did you have any traffic experts in the Carolina Portland Cement Company?

A. Well, you might call them so at that time. We did not have many experts. The men who managed the Carolina, my brothers, were very well acquainted with rates.

Q. To whom did the Carolina Portland Cement Company re-sell its cement?

A. They sold cement to contractors and construction work, and to dealers, too.

Q. What was the nature of the prices at which you sold them?

A. What was the nature of the prices?

Q. Yes.

Mr. Wooden: Objected to.

By Mr. Leisure:

Q. I mean, were they f.o.b.?

A. No; they were delivered.

38629. Q. Did you answer the question, Mr. Hanahan?

A. Yes, we sold at destination.

Q. Why, Mr. Hanahan? What were your reasons for selling in that way?

A. Well, because the man who bought it wanted it at the destination, and he wanted to know what it was going to cost him at the site of the work. He was not acquainted with water rates, rail rates, and combination rates. At those times we got some special rates.

Q. You mean the railroad would make special rates?

A. Yes. They would make a special rate for a job at a certain point.

Q. In delivering the delivered price to your dealer and contractors, how did you determine what delivered price you were going to quote a customer at a given time and given place?

A. Well, if the goods were going to be shipped from the port we knew the region in which the material was going to be used, we knew the going price at that point, and we added the freight to the destination point from

the ports, and if it was lower, the selling price there was lower than we could deliver it, we had to get out of the business. If it was higher—

Q. You say lower—had you finished?

A. It was higher we tried to meet the lowest price prevalent at that point.

38630 Q. Well, you say "higher." Under what circumstances were you able to quote higher?

A. Well, higher, I am talking about higher than the cost to us.

Q. Did you or did you not find the prices of the different sellers of cement were the same or different at a given market?

A. Well, the prices were the destination price, were pretty well the same, but they varied from time to time, yes.

Q. Was there any quality preference?

A. Well, in the early days the Vulcanite, we handled Vulcanite, that was a Pennsylvania cement. Some people would pay a little more for Vulvanite than they would for other cement, but that soon disappeared when the standard specifications were understood more thorougly by the trade. They would not pay any more for Vulcanite than they would for other cement, but there was always a preference on brand, even now.

38631 Q. Now, Mr. Hanahan, when the Volunteer plant began to operate in 1928, how did you determine the prices that you were going to quote?

A. We knew the prices prevalent in the region, and we quoted the lowest going price of our competitor.

Mr. Wooden: Now, Your Honor, I move to strike the question and answer as going over a subject that witnesses already called from this company have gone over, and there is no reason that I can see for adding to the testimony of those witnesses unless the president of the company wants to give us something different, but it does appear he intends to give us anything different. It is just repetition.

Trial Examiner Norwood: I am going to exclude this testimony as to these routine ways of doing business. It has been shown by so many Respondents, and the reasons for meeting the market price and how they meet it, unless the Counsel can show me that here is a Respondent who has employed entirely different methods than the others

I am doing that on the ground that there is so much evidence in on it that it is perfectly clear as to the na-
38632 ture of these transactions, and the Counsel has the privilege and right to adopt the testimony of the others and to connect it up in a very brief way so that this Respondent may be included in the benefits.

Proceed.

Mr. Leisure: Now, we could save considerable time, Your Honor, here, if Mr. Wooden had not indulged in what I conceive to be anticipating procedure. I had no intention of going any further. This witness sets the policies of his company. I only wanted to ask him the one question, which, when taken in connection with Mr. Parsons' testimony, the sales manager, it will be shown that this is the man who sets the policy. He is here tendered for cross examination as to whether or not in setting these prices he sets them under his own policy or as the result of any combination. I only intended to ask him one question.

Q. Mr. Parsons has already testified here, Mr. Hanahan, as your sales manager. Did any of your competitors recommend Mr. Parsons to you in any way when you employed him as your sales manager?

38633 A. No competitor recommended him.

Q. Did the Atlas Company have anything whatever to do with placing Mr. Parsons in your organization?

A. None whatever.

Q. Now, when you employed him, what, if any, instructions did you give him as to the way in which he should handle your business with respect to price and methods of sale?

A. Well, I instructed him he should go out into the territory, put his salesmen out, and sell at the lowest going price as long as we could meet that price.

Q. Mr. Hanahan, why did you do that; I mean, when you began selling why did you just meet the price? Why didn't you go out and sell lower than anybody else in the territory?

A. I knew from experience that if I sold at a lower price that that would be the price all over my market at once. I was not prepared to sell it any cheaper than my competitor sold it.

Q. When you began to operate on the basis of meeting the prices that you have testified, what happened?

A. Well, we sold cement.

Q. Well, can you refresh your recollecton as to the circumstances at the time when you first began selling as to the general market conditions?

A. General market conditions had by the time we got to selling, general market conditions had changed considerably. They were very sugasy, and then coming
8634 along in 1930, 1931, 1932, everything blew up, every business.

Q. What do you mean by "blew up," Mr. Hanahan?

A. Well, you know what the depression caused.

Q. That is what you meant?

A. Cement consumption, from one hundred and sixty-odd million barrels to something like fifty-three, annual consumption.

Q. Now, have you changed your policy of following the prices found in the field at any time?

A. No, sir. Well, we have changed them.

Q. When was that?

A. Well, we changed them with the T.V.A. and we changed them one time in Knoxville, in the early days, when we were not getting the amount of cement in Knoxville; the City of Knoxville, and the immediate territory, that we thought we ought to get in there because our competitor was getting it. We put in an arbitrary price in there, something like 25 or 30 cents lower than the Knoxville price.

Q. Suppose you tell us what happened? What was the result?

A. Well, we did not get any more business, and within a year we took it out again.

Q. What happened as far as your competitors were concerned, if you know?

A. They met the price and sold the cement.
8635 Q. How soon did they meet your prices?

A. At once, as soon as it was put out.

Q. And did there come a time, Mr. Hanahan, when you restored your price to the original levels?

A. Yes, sir. For about a year we tried it, for a year.

Q. And was that done as the result of any discussion or understanding or agreement with your competitors?

A. None, none whatever. We talked it over with Mr. Parsons; we decided to try it, see how it would work. It did not work.

Q. You restored it just as a matter of good business?

A. Yes, sir.

Q. Did any other mill establish a base at your mill as the result of this pioneering on your part?

A. No, sir.

Q. Have you initiated any reduction in price since that time?

A. To the T.V.A.; the Tennessee Valley Authority.

Q. Have you initiated—have you ever tried it again?

A. No.

Q. Why not?

A. Because we know it won't work.

38635 Q. Maybe I can cover a great many questions with just one general question, Mr. Hanahan:

Do you have any understanding with any competitor that you will quote delivered prices in a certain way?

A. No, sir.

Q. I think you have told us that you are in charge of the price policies of your company?

A. Yes, sir.

Q. Have you ever given your sales department any instructions about observing basing points in determining your delivered prices?

A. No, we have not. We very seldom talk about other people's price. We talk about our price at delivery point.

Q. Do you consider that you or your company, to your knowledge, is in any way endeavoring to maintain a basing point of pricing.

A. No.

Q. What are you trying to do?

A. We are trying to sell cement at a profit.

Q. Do you sell cement in Richard City, Tenn?

A. We do not, no.

Q. Do you sell it in that area?

A. Well, it depends upon what you call that area. We do not sell in Chattanooga, Tenn.

Q. That is what I had in mind. Why not?

38637 A. Well, we cannot. In the first place, the people in the community are loyal to an industry set down in its midst, and we would have very great difficulty in building up a trade in there.

Q. And do you sell in Birmingham, Ala.?

A. No, we do not sell there.

Q. Or that area? And to save time, do the same reasons apply there?

A. Yes, sir. Well, except in Birmingham, we could not get down there; freights are too high for us.

Q. And do you sell cement at Kingsport, Tenn.?

A. We sell cement near there, Johnson City.

Q. Well, I am talking about Kingsport.

A. Well, there is very little cement sold there, but we do not sell it at Kingsport.

Q. And, again, is there another mill there?

A. Yes.

Q. Do the same reasons apply that you have told us?

A. Yes, sir.

Q. How did you determine what discount terms your would use when Volunteer first began to market its product?

A. Well, we used the same terms that had been used for a number of years when we found quoted in that region; principally 10 cents cash 15 days, 30 days net.

38638 Q. Do you have any clause in your contracts giving the purchasers the benefit of a decline in price?

A. Yes.

38639 Q. During the N. R. A. Code, Mr. Hanahan, did you feel obligated to adhere to the methods and terms of sale prescribed in that Code?

A. Yes; whatever was prescribed in there we thought was law, and we tried to follow it just as close as we could.

Q. And after the N. R. A. Code, have you felt obliged to follow any practices or terms set forth in the invalidated code, or any subsequent compilations of trade practices?

A. No, we did not feel obligated, when the President and some departments asked us to follow them as far as we could, certainly as to labor, and we have.

Q. What are your contract terms today with respect to price decline?

A. A guarantee against price decline.

Q. Why did you not change your policy since the Code?

A. Because our competitor would have gotten all the business. If we would go to a contractor and tell him we were going to sell this cement at a fixed price during his contract, and the other man would go to him and sell him the cement against a decline, he would buy it from 38640 the other man. That is a matter that enters into the price.

Q. What is your practice, and acting in your official capacity, has it or has it not made any difference to the Volunteer Company in its selection of dealers whether the dealers are members of some dealer association?

A. It makes no difference. If he is a member, we deal with him; if he is not a member, we deal with him, just as if he was a member. We do not know anything about the affiliations.

Q. Has your company, Mr. Hanahan, ever had any understanding with any other Respondent in this case with respect to concerns that would or would not recognize dealers?

A. No; I know of none.

Q. Well, do you select your dealers in accordance with any particular qualifications?

A. No. We are glad to get one, if he has credit and has the facilities for serving the trade. He can-
38641 not be too small, and he cannot be too large for us.

Q. The record shows various services, which I will not take the time to go into with you now, Mr. Hanahan, rendered by dealers to cement manufacturers. From your experience in the building supply business, does the dealer render any service to the manufacturer only with respect to business which he physically passes through his warehouse?

A. He renders many other services. He takes up with the architect—

Trial Examiner Norwood: I do not think we need to go into that.

38644 By Mr. Leisure:

Q. As a producer of cement, Mr. Hanahan, would it be to your advantage or disadvantage if the price of cement fluctuated up and down?

A. That is, in reference to a dealer?

Q. Yes.

A. No, it would not be to our advantage.

Q. Would you just explain to the Examiner what would happen?

A. Well, if it moves up and down today and tomorrow, today we would have a contract for a certain price, and tomorrow that price would change, and it might change for the lower, and the party to whom we had sold would require us to meet that price or cancel the contract and we

would lose the business. Furthermore, if it changed
38645 that way, it would not help us, because our competitors would meet the lower price, or if it was a higher price it would not help. If it fluctuated up and down frequently, we would be at a loss how to know how to sell cement.

The witness identified Resp. Ex. 2925 as a policy issued by Volunteer. He was consulted with reference to it.

(RESP. EX. 2925, was offered and recived in evidence.)

38646 The witness identified Resp. Ex. 2926 as a letter he received. Volunteer did not issue any announcement of its sales policy in February, March or April 1935.

(RESP. EX. 2926 was offered and received in evidence.)

38647 The witness identified Resp. Ex. 2927 A-C as documents which he received relating to the marketing policy which Volunteer issued in May, 1935.

(RESP. EX. 2927-A, 2927-B, and 2927-C was offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Hanahan, you observed there is a reference in this letter to you, concerning your going to Knoxville to discuss this matter. I want to know whether you did so.

A. I did so after a time.

Q. And did you discuss it there with Mr. Parsons?

38648 A. Yes, sir.

Q. Now, I would like for you to tell us what your reasons were, or what caused your company to wait until the first of May before it issued a statement of its policy.

A. Well, the N. R. A. was running at that time, and we wanted to be certain as we could that the policy would be in line with what the N. R. A. wanted, although we had rejected several policies, we studied the matter and issued this sales policy in May. We had no great incentive in keeping the matter delayed, but I was going over to Knoxville some time and the matter waited until I got there.

Q. Well, now, did the policy, as announced, accord with the suggestions made by Mr. Parsons?

A. No, it did not.

Q. Sir?

A. No, it does not, in one small particular.

Q. Will you explain that?

A. That is the sales to counties, direct sales to counties. It was—the counties do not use much cement and do not buy very frequently, and Mr. Parsons wanted to pass this on to the dealer but after discussing it with him we decided that we got to go ahead and take the additional expense of selling, and so did.

Q. Had you been consulted by your sales department with respect to any important changes in the prac-
38649 tices or policies of your company when and after they have been made?

A. By other companies? By competitors?

Q. I had reference to your own department first, and I was going to ask you about competitors second. I just want to know if you have been consulted by your sales department with respect to any—

A. Oh, yes, yes. Yes, sir.

Q. Now, I would like to know whether or not you have discussed things of that kind with your competitors in any way?

A. No, sir; I have not, no.

Q. Without taking the time to ask you a series of questions, the record shows your company joined the Institute in December, 1929. Just let me ask you one question: Did you attend any of the organization meetings?

A. No, sir.

Q. And was the question of joining The Cement Institute brought up before your board of directors?

A. It was, yes.

Q. I am, of course, now, speaking of the Volunteer Company.

A. Yes.

The witness identified Resp. Ex. 2928 A-B as a true and correct copy of the minutes of a Board of Directors meeting of Volunteer dated November 23, 1929.

38650 Mr. Leisure: I am only offering it to show the action taken by this company, Your Honor. I am not trying to prove anything else by that.

38651 (RESP. EX. 2928-A and 2928-B was offered and received in evidence.)

Mr. Leisure: I am going to ask to have marked for identification a letter dated November 23, 1929, and say to the Examiner in advance it is a letter of transmittal; and to save time of argument, the only reason I am offering a

letter of transmittal on the record is because it has a condition attached to the joining of the Institute and I feel because of that I should offer it.

(The document was marked for identification "Respondents' Exhibit 2929.")

By Mr. Leisure:

Q. Will you just identify that?

A. Yes, sir; I wrote that.

Q. You wrote it?

A. Copy of it.

(RESP. EX. 2929 was offered and received in evidence.)

38652 By Mr. Leisure:

Q. Do the exhibits which I have just shown you, Mr. Hanahan, do they or do they not show, and were they intended to show the conditions under which you joined the Institute?

A. Yes, sir.

Q. At the time you joined, did you understand that the Institute was to or would police trade practices or prices in the industry?

A. I had no such understanding.

Q. And has it been so, to your knowledge?

A. Not—haven't policed Volunteer.

Q. Now, Mr. Hanahan, it shows in the record already that your company, the Volunteer, resigned from The Cement Institute on December 1, 1930. Who in your company made that decision?

A. I made it.

Q. And will you tell us why?

A. Well, things were pretty bad, money was pretty scarce, and we wanted to save every penny we could. We were in the banks borrowing money from the banks, and we did not think it was a proper expenditure; the directors had to endorse the paper, and we had hard going.

Trial Examiner Norwood: You mean proper

38653 from the standpoint of justifying the expense?

The Witness: The expense, did not justify the expense. We needed it for other things.

The witness identified Resp. Ex. 2930 A-B, a letter dated May 19, 1933 on the letterhead of Nazareth, together with excerpts dated May 20, 1933, as letters he recognized having received; Resp. Ex. 2930 C, a letter May 23, 1933, ad-

dressed to Mr. Coffin of Nazareth, as a letter he wrote. They relate to rejoining the Institute in 1933.

38654 (RESP. EX. 2930-A, 2930-B, and 2930-C was offered and received in evidence.)

The witness identified Resp. Ex. 2931-A as a telegram from J. B. John, Raff, Porter, Murray, Story, McFarland, Smith, Condon, Struckman, Brown, Young, Rader, asking that Volunteer join the Institute; Resp. Ex. 2931-B

38655 as a telegram from the witness as President of Volunteer that, subject to the approval of the Board of Directors and also subject to the revision of the Mallory plan, Volunteer would make application for membership to The Cement Institute; Resp. Ex. 2931-C as a "copy of the minutes of the meeting of the board of directors, approved our joining the Institute." These documents

38656 explain the reasons which prompted Volunteer to rejoin the Institute in 1933.

(RESP. EX. 2931-A, 2931-B, and 2931-C was offered and received in evidence.)

The witness identified Resp. Ex. 2932-A, a tele-

38657 gram, dated May 28, 1935 from Mr. Coffin to him, as a telegram he received, Resp. Ex. 2932-B, a letter from the witness, dated May 28, 1935, to Mr. Coffin, as a letter he wrote.

38658 (RESP. EX. 2932-A and 2932-B, was offered and received in evidence.)

By Mr. Leisure:

Q. I would like to put to you the question that I withdrew a moment ago, Mr. Hanahan:

In that letter, do you consider—that is, in your letter to Mr. Coffin—that you in any way were committing your company to an agreement or understanding to continue the practices required under the invalidated N. R. A. Code?

A. No, sir; I did not think that we were bound by any rules and regulations that they might make.

38659 Q. Did you understand that you were entering into any agreement or understanding about continuing those practices?

A. No.

Q. Before the recess you told us that your primary reason for joining the Institute was the N. R. A.

A. That is in 1933.

Q. Yes.

After its invalidation, did you give any consideration to terminating your membership?

A. Well, from time to time we have considered terminating our membership, but have decided just to keep on. We are still members.

Q. Oh, you decided just to keep on. Was there any particular reason for your continuing your membership?

A. Well, we were getting some good out of the Institute. It was recommended by the authorities just after the invalidation that we keep on practicing those things like they were in the N. R. A., and we have stayed in for that reason.

The witness identified Resp. Ex. 2933-A, a letter from the Institute dated June 10, 1936, as a letter he received; Resp. Ex. 2933-B, a letter dated June 11, 1936 to the Institute, as a letter which he wrote.

38661 (RESP. EX. 2933-A and 2933-B, was offered and received in evidence.)

By Mr. Leisure:

Q. Mr. Hanahan, just why did you vote for a dissolution of The Cement Institute?

A. Well, we felt that the Institute had accomplished all that it could, and the dues we were paying were quite considerable, and if they wanted to dissolve we were in favor of dissolving.

Trial Examiner Norwood: When was that?

The Witness: In 1935 or 1936, wasn't it—1935 or 1936—1936.

Mr. Leisure: 1936, Mr. Hanahan.

The Witness: Yes.

Mr. Leisure: That will refresh your recollection. (handing a paper to the witness.)

The Witness: That was in June, 1936.

By Mr. Leisure:

Q. When it was not dissolved in connection with your ideas at that time, why did you not resign?

A. Well, as I said, we were getting some good out of it. The industry as a whole wanted it. Evidently they voted for it, and we were willing to pay for the in-
38662 formation that we got out of the books, as we had no traffic department.

38663 Q. As far as your personal experience was con-

38664 cerned, has the Institute or your competitors or the industry attempted to bring about any control for stablizing the industry, as far as prices are concerned?

A. No, sir.

Q. In your bid, Mr. Hanahan, in March, if it netted your company $1.65 at the mill, taking your costs into consideration, do you consider that an unjustified price?

Mr. Wooden: Just a minute. That is objected to, Your Honor, as irrelevant and immaterial.

Trial Examiner Norwood: Sustained.

Mr. Wooden: For the reasons stated many times, and particularly for the reason stated to the Supreme Court in the Wisconsin Oil Company case.

Trial Examiner Norwood: Sustained. I think we have gone over that and have agreed that there is no such issue.

Trial Examiner Norwood: Whether the price was too high or too low.

Mr. Leisure: Exhibit 291-A—the language should be taken out.

Trial Examiner Norwood: Well, we will try to get it all out.

Mr. Leisure: I am only trying to explain the exhibit, that is all.

38665 Mr. MacIntyre: What is the number of that exhibit?

Mr. Smith: 2991.

Mr. Wooden: A Commission's exhibit?

Mr. Leisure: Yes, a Commission's exhibit.

Mr. Smith: No; Respondents'.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Leisure: I think there are still a number of those T. V. A. exhibits in the record that should be taken out unless we are allowed to ask questions of this character from witnesses who did the actual bidding.

Trial Examiner Norwood: But the Counsel suggests that this last exhibit that you referred to was yours.

Mr. Leisure: Well, I have several files of papers here, Judge; and I read from one of our own exhibits which we have, but I have here in my right hand the group of T. V. A. exhibits starting with Commission's Exhibit 345-A, and there are several hundred of them. Now, I think they should come out unless we are allowed to explain what happened.

Trial Examiner Norwood: Well, we will try to take that up when we have thoroughly digested the situation, and I think inasmuch as both sides have agreed that it is not in issue I think probably it is unnecessary to
38666 eliminate them, they will not be considered.

Mr. Brick: Well, I do not think there has been any agreement, Judge, on the side of Respondents with regard to the T.V.A. material. The original position of Respondents was that it did not belong in the case and all we sought was an opportunity to meet the material which Mr. Wooden had introduced.

Now, there is no agreement, as far as the Respondents are concerned. We want to meet the material in the case.

Trial Examiner Norwood: Possibly I used the wrong word. I think there has been a meeting of the minds on it,—I will not say an agreement or understanding.

Mr. Leisure: No animus contrahendi.

Trial Examiner Norwood: Go ahead.

By Mr. Leisure:

Q. From your point of view, Mr. Hanahan, as an executive of your company, was your October bid adequate for your company, and reasonable?

Mr. Wooden: Same objection, Your Honor.

Trial Examiner Norwood: The objection is sustained.

Mr. Leisure: I again move, on the basis of the objection and Your Honor's ruling, that these T.V.A. exhibits now in the record and offered by the Commission be stricken.

38667 Trial Examiner Norwood: I will consider any of them that the Counsel will specify later.

Mr. Wooden: Well, I will say again, Your Honor, in that connection, I do not know of any that goes into the question, and I do not want there to be any that goes into the question whether the price to T.V.A. was reasonable or not.

Trial Examiner Norwood: Proceed.

Mr. Leisure: I am referring to Commission's Exhibits 345-A and B, 354-A and B, Your Honor, C and D, 562-12-M, 12-L, 12-H, 12-J, 12-K, 562-12-X, 12-Y, 12-Z, 13-A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, 355-A, B, 362-14-H, 562-14-I, 356, 357-A, B, 362-14-B, 362-15-B, C, D, E, 340, 342, 350-G, 351-A, B, C, 359, 360-A, B, 396-A to 2-K, 395-A, B, 397, 398-A, B, C, D, E, 399-A to 3-Z, 400-A,

B, C, D, E, F, G, 562-9-V and 9-W, 562-9-X, 14-D, 9-T, 9-U, 558-A, B, C, 562-9-O, 406-A, B, 401, 402-A to E, 562.

There may be others, Your Honor, but those are the ones that I have immediately in mind.

Trial Examiner Norwood: Now, those are Commission's exhibits which you move to strike?

Mr. Leisure: Yes.

38668 Trial Examiner Norwood: Well, I shall study those and rule on it later, and ask the Counsel for the Commission to check those to see—I think that probably a number of those have been withdrawn.

38669 Washington, D. C.,
Friday, May 17, 1940.

38670 J. BOSS HANAHAN, thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Leisure (Continued).

38671 Trial Examiner Norwood: There is no prejudice that could result to the Respondents unless some contention is made that there was a Price-Waterhouse report, and that there was an attempt to influence. The Respondents have their presumption of innocence all the way through.

38672 Q. Was the October price that your company bid, Mr. Hanahan, based in any way upon what it fairly cost your company to manufacture cement?

Mr. Wooden: Objected to, Your Honor, as irrelevant and immaterial in view of the striking from the record of all material that goes to the question of the reasonableness of the price to T. V. A., and the relation of that price to costs.

38673 Trial Examiner Norwood: I think that this goes primarily to whether the price was reasonable, and I think we have excluded that.

I will sustain the objection.

By Mr. Leisure:

Q. Well, let me ask you this, then, Mr. Hanahan: Was this October price based in any way upon the disinterested inquiry made by Price, Waterhouse & Company?

Mr. Wooden: That is objectionable for the same reason.
Trial Examiner Norwood: Sustained.

By Mr. Leisure:

Q. Now, during those negotiations, and in the course of them with T. V. A., did you or your company at any time authorize Mr. Trainor to represent your company?

A. No, sir.

38674 Mr. Leisure: Referring to your Exhibit 346-A and B, Mr. Wooden.

By Mr. Leisure:

Q. Did you or your company, to your knowledge, have anything to do with Mr. Trainor's coming into the negotiations?

A. None whatever.

Q. And did you personally attend any of the conferences between—with Dr. Morgan in Washington in May of 1934?

A. In May?

Q. Of 1934.

A. Not until after a plan had been worked out with Dr. Morgan for Price, Waterhouse & Company to examine our books.

Q. That was not in May, was it, Mr. Hanahan?

A. No.

Q. And it was not in Washington, was it?

A. No.

Q. Well, my question is, did you attend any of the conferences in May of 1934?

A. No.

Q. In Washington?

A. No.

Q. Now, did you give Mr. Trainor any authority to send any telegram on behalf of you or your company?

Mr. Leisure: I am referring to your Exhibit 350-C and D, Mr. Wooden.

38675 A. No.

By Mr. Leisure:

Q. Did you know anything about that telegram?

A. Nothing about it; question of negotiations.

Q. Now, at that time did you consider whether or not the price of your company, based upon competition from

the Government plant at Sheffield, Ala., would be a fair method of determining what your price ought to be?

Mr. Wooden: That is objected to on the same ground as the previous objection, irrevelant and immaterial, going into a question of fairness and reasonableness of price.

Trial Examiner Norwood: Objection sustained.

By Mr. Leisure:

Q. Mr. Hanahan, does the Volunteer Company follow any basing-point method of pricing?

A. We only follow the pricing in the market in which inquiry is made. We follow the system of meeting the lowest competitive price.

Q. And in doing that, do you consider that you follow any other system other than meeting the lowest competitive price?

38676 A. That is the only one we recognize.

Q. I want to ask you one further question about the negotiations during that T.V.A. period, Mr. Hanahan. I would like to ask you whether or not, as a taxpayer, you considered whether or not the Government plant at Sheffield, Ala., was warranted?

A. As a taxpayer—

Q. Yes. I simply want to know whether you considered the Government plant at Sheffield for manufacturing cement for T.V.A. was warranted or unwarranted.

Mr. Wooden: Objection. Irrevelant and immaterial.

Trial Examiner Norwood: Objection sustained.

Mr. Leisure: I was referring, Mr. Wooden, to your Exhibit 562-12-C, 12-D.

Trial Examiner Norwood: You may meet those things by factual matters.

Mr. Leisure: That is what I was endeavoring to do, Judge.

Trial Examiner Norwood: You are asking this witness what he considered.

Mr. Leisure: Exactly. In other words, his considerations are facts in this situation.

Trial Examiner Norwood: Go ahead.

By Mr. Leisure:

Q. Will you look at Commission's Exhibit 1262-12-C, 12-D, Mr. Hanahan, and tell us whether or not the atti-

tude there expressed by Mr. Trainor reflected your
38677 attitude at the time (handing a document to the witness).

A. I looked over this. I have not read the whole letter, but I presume it is in reference to the buildings of the Sheffield plant. Your question is along that line.

Q. That is correct, sir.

A. He had no instructions or right to represent us in this particular thing. His—

Q. I want to find out whether he had authority to express your attitude in any way at that time.

A. No, sir. He had no authority to express, but he expressed that he thought they ought not to build it.

Q. Now, did you consider at that time that the price finally stated by Dr. Morgan was or was not a substantially fair adjustment of the negotiations with T.V.A. on price?

Mr. Wooden: That is objected to, Your Honor, for the reasons previously stated: Irrevelant and immaterial.

Trial Examiner Norwood: Sustained.

38683 Mr. Wooden: I have no objection to the last part of the answer the Reporter has just read, beginning about the disruption of the market, provided that is intended to be—the word "cost" there is intended to be "price," but if it is intended to be cost, as the Reporter read it, then the portion to which I refer and moved to strike is what the Reporter has just read.

Mr. Leisure: Well, I can very readily see why just that portion is the part Mr. Wooden would like to have taken out. As long as there is any charge in the complaint or in the evidence adduced here by the Commission that
38684 these Respondents, including the president of this company that is on the stand now, entered into any collusive understanding, any collusion or understanding as to those bids, this testimony is material and relevant. I have not offered it to show what his costs were or to go into that at all, but to show that his negotiations were not based on collusion with other companies.

Trial Examiner Norwood: Well, I think you may show that without injecting the costs into this. After we have gone to so much trouble to eliminate it, I shall allow the motion as to striking all that part of the answer beginning, "and I told him that our cost was well up," and so forth, including the remainder of the answer.

Mr. Wooden: Well, I do not know what the rest of the answer was; it was not read.

Trial Examiner Norwood: Strike it all from there on. The answer was not responsive to the question.

Mr. Wooden: I do not know whether my motion extended that far.

Trial Examiner Norwood: Proceed.

Mr. Wooden: As far as Your Honor's ruling, I carefully had the Reporter read the portion that I moved to strike. There may have been something after that that would not come within the terms of my motion.

Trial Examiner Norwood: I asked him to read
38685 it all, and he did.

H. H. LUCAS, called as a witness on behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Willrow.

I am associated with Petoskey Portland Cement
38686 Company. John L. A. Galster is the chief executive officer of our company. He has held the posi-
38687 tion of president for three years. I am not connected in any way with any other cement producing company.

I am connected with the Petoskey Cement Sales
38688 Company, a wholly owned subsidiary. I have some silos located in Chicago and Detroit, and the Petoskey Cement Sales Company has a silo in Milwaukee. We ship by boat to these silos. We ship from the silo to the customer by rail, but most of it is trucked. The Petoskey mill began to manufacture cement in 1921. Petoskey was originally referred to and commonly called a 750,-
38689 000 barrel mill. That capacity was increased by 100% in 1925.

Q. And would you tell us the circumstances under
38689 which it was increased?

Mr. Wooden: I also have offered to stipulate that
38690 every increase in capacity inaugurated or initiated by any member of the industry was in the belief that the conditions and the demand were such as to warrant it.

A. The demand had been very good from the time we

had started operation up to and including that time. It was apparent to all those in the organization that there was a demand for considerably more cement than we could produce. In addition to that, there was some economy to be effected in a mill twice the size of the one that we were then operating.

38691 By Mr. Withrow:

Q. Were those economies substantial, Mr. Lucas?

A. I would say yes.

Q. Has it ever entered into any agreement to restrict or limit the production of the mill?

A. No.

(The foregoing testimony beginning with "Has it ever entered into" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

The witness identified Resp. Exs. 2934 and 2935 as tabulations prepared under his supervision from the books and records of the Petoskey Company; and he could vouch for their accuracy.

(RESP. EXS. 2934 and 2935 were offered and 38696 received in evidence.)

By Mr. Withrow:

Q. Now, Mr. Lucas, will you look at Respon- 38697 dents' Exhibit 2934 there? I notice that, on that tabulation under 1928, under "Barrels Purchased," 57,000 and some odd barrels purchased, the same as indicated for 1929 and 1936. Would you tell us the circumstances under which those—would you just tell us what those items mean?

A. Well, all three of those years, largely, as I recall, due to the fact that we misjudged the potential demand and did not start as early as we might have during the winter months, we were not able to completely supply the demand that we had, and we purchased the amount shown there.

Q. Now, would you just describe for us briefly the nature of the territory immediately surrounding your mill from the point of view of the cement consumption.

A. Yes. There is a very—the mill is located in a very sparsely populated area. It is on Little Traverse Bay, which is on Lake Michigan, and is well up in the 38698 northern part of the Lower Peninsula of Michigan.

We have a very sparsely populated region within a radius of considerable miles around us.

Q. About what percentage of your shipments in any year are made in a radius of, say, 75 or 80 miles of the plant?

A. Less than 5 percent.

Q. And what were the considerations in connection with the location of the plant at Petoskey, Mich., Mr. Lucas?

A. A very substantial deposit of limestone and raw materials for the production of cement, and the availability of water transportation.

Q. And I believe you have already said you took advantage of the water transportation?

38699 A. Yes.

Q. Are there any areas in which the Petoskey Company once solicited business but has since abandoned?

A. Yes.

Q. What were they, and tell us briefly the reasons for abandoning them.

A. We at one time solicited business in the Ohio market in the vicinity of Cleveland with the idea of transporting it down there by water. However, that was prior to the time that we were handling it in bulk, and handling it in packages was expensive. We could not do enough business to justify our continuing.

We also have been in and out, and in again, in the market, in the vicinity of the Twin Cities, Minnesota.

We also traveled at one time a man over a portion of Northern Indiana some years ago, but we were not able to give service there comparable with the competition we met, and we could not do enough business, or secure enough business to make it profitable.

Q. Does your company usually sell at delivered prices, Mr. Lucas?

A. Yes.

Q. Do you make any sales today f.o.b your mill?

A. Yes.

By Mr. Withrow:

38700 Q. And how far back did this practice of making some sales f.o.b. your mill go, Mr. Lucas, roughly?

A. I think there have been some sales on that basis almost since the inception of the mill.

Q. There has been no change in policies since July, '37?

A. No.

Q. And what is your practice, for instance, in Chicago? Do you sell on a delivered basis there, or f.o.b. the silo?

A. We sell both.

Q. And you have a flat price at the silo for people who come to the silo and take delivery there?

A. Yes.

Q. About how much cement, Mr. Lucas, is consumed in the City of Petoskey?

A. Approximately four to five thousand barrels annually.

Q. And do you sell all of that business normally?

A. Yes.

Q. Now, has Petoskey ever had a maximum mill net to which you added the freight rate in order to arrive at the delivered prices?

38701 A. No.

Q. And would you tell us your reasons for having such a maximum, so-called base, Mr. Lucas?

A. We find buyers are interested in price at destination, and we meet competitive prices.

Q. Now, in your experience, Mr. Lucas, have there been any price announcements by any of your competitors increasing prices which you did not follow along with?

A. Yes, I think so.

Q. Well, can you think of any specific instance?

A. If I am not mistaken, the Aetna Portland Cement Company put out some prices at one time that were in advance of those that were in existence. We did not follow them, because we were waiting to see what more dominating factors in the market might do, and when they did not follow, we did not follow.

Q. Did the same thing happen around Chicago in '37? Do you recall?

A. Yes. I think that the Marquette Company put out a price about that time, that we did not follow.

Q. Now, is there any competitor of yours which you would call a price leader in the territory where you do business?

A. Yes.

Q. And which one is that?

A. Well, I would say in Michigan, the Huron Portland Cement Company.

38702 Q. Would you tell us why you consider Huron to be a price leader?

A. They have the largest producing unit in the State. They have been there a long time. They are capable today of satisfying practically the entire demand. And it is impossible for us to get any more than what they are willing to take, and we have never seen the time when we wanted to take any less.

Q. Now, has there ever been an agreement between you and any cement manufacturers that Huron would be the price leader in the Michigan area?

A. No.

Q. Would you be free to exercise price leadership if you should so desire, Mr. Lucas?

38703 A. Yes.

Q. Now, are you the one who determines the sales and marketing policies, you and Mr. Galster, of the Petoskey Portland Cement Company?

A. Yes.

Q. Do you ever secure lists of base prices from your competitors?

A. No.

Q. When you make a change in your price, whom do you advise of that change, Mr. Lucas?

A. Our own salesmen.

Q. And do you also inform your customers?

A. Yes.

Q. Do you notify your competitors?

A. No.

(The foregoing testimony beginning with "Do you ever secure" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

38704 Q. Now, on the termination of the N. R. A. Code by the Schechter decision, did you continue to file prices, or did you file prices with the Trade Practice Committee?

A. For a short time.

38705 Q. Did you enter into any agreement with any of your competitors to abide by the prices which you had filed?

A. No.

Q. Now, what do you mean by the phrase "Mill net," Mr. Lucas?

A. That which remains after deducting bags, transportation, from the delivered price.

Trial Examiner Norwood: A little louder.

By Mr. Withrow:

38706 Q. Which do you consider to be the price, the delivered price or the mill net?

A. Why, the delivered price.

The witness identified Resp. Exs. 2938 A and B and 2939 A and B as copies of forms "we" used in making quotations. The front and back of those two forms are the terms and conditions on which cement is sold. These forms have been in use by Petoskey for at least 3 years or more, and forms are very similar almost from the beginning. There may have been some minor changes as compared with the original forms that "we" had.

These forms were used before July 2, 1937. These
38707 forms are identical as they are there except that this particular form has provision for high early strength and waterproofed cement. These provisions are comparatively new "with us". They were added. The terms and conditions are the same.

(RESP. EXS. 2938-A, 2938-B, 2939-A, and 2939-B were offered and received in evidence.)

Q. Do you use the freight rate service of the Institute?

A. Yes.

Q. Did anyone from Petoskey participate in the
38708 preparation of the Institute rate book?

A. No.

Q. And prior to the issuance of the books by The Cement Institute, where did you secure your freight rate information?

A. From an independent traffic man by the name of J. C. Graham, of Jackson, Mich., who for some years got out freight rate books for at least three or four companies in the State there, and we got it from him.

Q. And you paid him for that service?

A. Correct.

Q. To your knowledge, did Mr. Graham ever have any connection with any cement manufacturers?

A. No.

Q. Did he perform this rate service only for cement people?

A. This specific rate service, yes.

Q. But did he perform other rate services for other people?

A. Well, I do not know as you would classify them as rate services. He has always been more or less a counsellor on traffic matters.

Q. Can you tell us in what form these rates were,—in cents per hundred pounds in Mr. Graham's rate book?

A. Yes.

Q. Does the Petoskey Company have a traffic department, Mr. Lucas?

A. Not as such, no.

38709 Q. Is it equipped to,—at the present time,—to secure the rate information necessary for your company to do business?

A. Certainly not without additional staff.

Q. Now, have you ever requested The Cement Institute to have any additional shipping points shown in the Institute rate book as headline points?

A. Yes, I think we asked for our own.

Q. And was this request complied with?

A. Eventually in some of the books.

Q. Mr. Lucas, do you have any agreement with your competitors to use the Institute rate book whether the rates in it are right or wrong?

A. No.

(The foregoing testimony beginning with "Mr. Lucas, do you have" was adopted by Georgia, Giant, Standard and Vulcanite.)

By Mr. Withrow:

Q. What railroad is your mill located on, Mr. Lucas?

A. The Pere Marquette.

Q. Just on one railroad?

A. Yes.

Q. Do you use the Institute rate books for actual

38710 freight rate information in connection with shipping cement?

A. Some.

Q. Now, do you use any conversion tables in connection with the Institute rate books?

A. Yes.

Q. And who prepares those conversion tables?

A. Mr. Edwards, in our office?

Q. He is the traffic clerk in your office?

A. Yes.

Q. And is there any agreement or understanding between you and your competitors as to how the rates should be converted in cents per barrel?

A. No.

(The foregoing testimony beginning with the words "And is there any agreement" was adopted by Georgia, Giant, Standard and Vulcanite.)

Q. Do you show routing information on all of your bills of lading which you ship by rail?

A. No.

Q. Do you find that it is necessary, in order to protect you on the lowest rate?

A. No.

Q. When you do include the rate, do you insert the rate in the bill of lading, when you tender it to the railroad?

A. Yes.

Q. And where do you get the rate from?

A. At times out of the Institute rate book; at times out of the tariff.

38711 The witness identified Resp. Ex. 2940 as received by him in the regular course of business.

(RESP. EX. 2940 was offered and received in evidence.)

38714 By Mr. Withrow:

Q. Did you issue a printed announcement of your company's classification of business between various purchasers after the suspension of Article XI of the N. R. A. Code?

A. Yes.

Q. And do you recall the circumstances under which you issued that announcement?

A. Yes. With the going of N. R. A. there was some confusion in the trade, and particularly on the part of the dealers as to just what would be their status, and we were being pressed by many of them to know what our policy was going to be. As the result of that, we sent out a printed announcement.

38717 By Mr. Withrow:

Q. Mr. Lucas, would you tell us under what circumstances you commenced selling concrete products manufacturers direct?

38718 A. Yes, during the Code, that was one of the provisions, that they would be sold, and to be competitive, why, we sold them on the same basis.

Q. And did you enter into any agreement with your competitors that you should sell them direct—I mean, other than this provision of the N. R. A. Code?

A. No.

Q. Now, you said something about issuing a policy announcement to the trade about what you would sell direct and what to dealers. Do you recall about when that policy was issued, Mr. Lucas?

A. No, I cannot give you even an approximate date.

Q. I will show you this document and ask you if that refreshes your recollection?

A. Yes, this is a copy of it.

Q. What was the date?

A. February 25, 1935.

Q. And have you issued any similar announcements subsequent to that one?

A. No, I think not.

Q. Now, do you ever vary from that announced policy?

A. Oh, yes.

Q. Well, would you give us an example, if you can think of one offhand?

A. Well, the City of Detroit is quoted direct.

38719 Q. How about Wayne County?

A. Wayne County is quoted direct.

Q. Now, in determining the sales and marketing policies of your company, do you or do you not take into consideration the wishes and complaints of your own dealer customers?

A. Certainly we do.

Q. Do you ever sell to dealers or contractors who were not sold by your competitors?

A. Yes.

Q. And do you find that some of your competitors sell to dealers and contractors to whom you do not sell or solicit?

A. Yes.

Q. Have you any agreement or understanding with your competitors as to who are to be considered cement dealers?

A. No.

Q. Do you have any agreement with any dealer associations as to who should constitute dealers?

A. No.

Q. Have you ever refused to sell any dealer because he was not a member of some dealer association?

A. No.

Q. Are you at all interested in whether your dealers are members of building supply dealers associations?

A. No.

Q. Have you ever had any of your customers at-
38720 tempt to divert shipments of your cement?

A. Yes.

Q. And what did you do about it, Mr. Lucas?

A. Well, we tried to prevent it.

Q. And would you tell us why you tried to prevent it?

A. Yes. We respect a dealer and his territory, and if some other dealer goes in there with our product, why, we cannot long expect to continue to receive the man's business who is set up in that community and doing business there regularly.

Q. And do your dealers under such circumstances complain to you?

A. Very vigorously.

Q. Did you ever enter into any agreement with your competitors to prevent diversions?

A. No.

Q. Or did you ever enter into any agreement with your competitors to stamp your bills of lading to prevent diversions?

A. No.

Q. Is cement trucked from your mill at Petoskey, Mr. Lucas?

A. Yes.

(The foregoing testimony beginning "Did you ever enter into any agreement" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Q. Do you allow dealers to come to the mill and truck their own cement?

A. Yes.

Q. And how long have you allowed them to come to the mill and truck cement?

38721 A. Ever since the mill has been there.

Q. Do you also have cement delivered to dealers by trucks?

A. Yes.

By Mr. Withrow:

Q. I show you Respondents' Exhibit 2946, and ask you to tell us what it is.

A. This is an announcement of June 9, 1934, to the effect that we are offering an additional service from our mill at Petoskey, Mich., to Lansing, Mich.; namely, that we will truck to customers from our mill within reasonable trucking radius.

Q. And what were the circumstances surrounding your announcement—I mean, what made you announce it at that time?

A. Well, prior to that time there had been no adequate trucking facilities in that country there which we could use for this purpose, and likewise it was not until about that time that the general road conditions in that vicinity around there were such that you could truck any appreciable distance economically. About this time those things more or less came to a head, and, in addition to that, we had a road job which we were able to offer a trucker as sort of a backbone to get started, and that was
the beginning of trucking in this form from our
38722 plant.

Trial Examiner Norwood: Do you mean that you hauled the cement, yourself, and charged them the delivered price based on rail?

The Witness: Correct.

Trial Examiner Norwood: Did you sell any of them delivered to their trucks at the mill on an f. o. b. mill net price?

The Witness: Yes.

By Mr. Withrow:

Q. In other words, you were selling it on both bases?

A. Optional.

(RESP. EX. 2946, was offered and received in evidence.)

By Mr. Withrow:

Q. Can dealers come to your silo and haul cement away in their own trucks, Mr. Lucas?

A. Yes.

Q. Mr. Lucas, I show you a copy of Commission's Exhibit 1006-D, and ask you if you recall that letter
38723 (handing a document to the witness).

A. Yes.

Q. And what were the circumstances surrounding your writing that letter, if you recall?

A. This was during the Code, and I think everyone was anxious to comply with the law as we understood it, and there were constantly some questions coming up as to whether some things were permissible under the Code, and this particular condition was one that I was anxious to have clarified, because we were involved.

Q. You refer in that letter, I believe, to Green Bay, Wis. Could you tell us, briefly, if you recall what the set-up was with Green Bay?

A. Yes. The Aetna Company was transporting cement by boat to Green Bay, and in turn having it distributed by trucks out of there by a dealer who was acting more or less as their representative.

Q. And was this dealer—I believe it was the Limestone Products Company—did that dealer file its prices subject to the N. R. A. Code?

A. No, I think not.

Q. And what action, if any, was taken by the N. R. A. Code?

A. No action. I think the chairman simply said that he would refer it to the Code Authority, and, if I am not mistaken, that is about the last I heard of it.

38724 Q. Do you deliver cement by truck to dealers all over the State of Michigan, Mr. Lucas?

A. All over the Lower Peninsula of Michigan.

Q. And would you tell us the reason for not delivering by truck in the Upper Peninsula?

Trial Examiner Norwood: Now, when is this you are talking about?

The Witness: Well, Your Honor, we have been delivering by truck in parts of the Lower Peninsula of Michigan since at least as far back as 1925, and it has been—that area has just expanded, has facilities and roads.

Trial Examiner Norwood: What you are telling us covers a period prior to July 2, 1937, does it?

The Witness: Oh, yes.

38725 Go ahead.

By Mr. Withrow:

Q. Mr. Lucas, I show you copies of two invoices that are part of Commission's Exhibit 2740, and I would like to have you just explain on the record how this shows both

the shipment by rail and by truck on the same invoice. What were the circumstances?

A. Oh, these invoices cover shipments made into the Grand Rapids market. Trucking is very prevalent in there on the part of our competitors from silos at Holland, Muskegon, and some out of Detroit.

This market is too removed from Petoskey to truck to, and we at the present time, or up until very recently, shipped there in cars, then trucked from the car to the dealer to meet the competitive condition we found there, and these invoices, accordingly, show car shipments, but you will notice a car has been split two ways, and there is 60 barrels to one and 80 to the other.

Q. You were referring to Commission's Exhibit 2740, were you not?

A. Correct.

38726 Q. Now, there are some exhibits in evidence, Mr. Lucas, which tend to show that there was at one time a 15-cent differential at your mill when they came to the mill and took truck delivery back in 1930 or 1931. Could you tell us what actually was done at the plant?

A. Yes. That figure was the Petoskey price, as I recall, less the rate from the mill to Petoskey, which is the minimum line haul, plus 15 cents platform charge, or whatever kind of a charge you want to call it.

Q. Now, did you ever enter into any agreement with your competitors to charge this 15 cents?

A. No.

Q. And can you tell us why you adopted that practice?

A. Yes. At that time there was some slight practice and that business being picked up in very small lots on the part of dealers, and it was exceedingly small for the most part, because dealers up there consumed a limited amount within a given time, and it got to be quite a nuisance coming in there and interrupting the regular carloading, and we did not have the facilities to take care of them. We more or less devised that way of giving them an equitable price, allowing them to come and pick it up at the plant, and at the same time compensating us for the additional trouble and the expense we went to in connection with that type of handling.

Trial Examiner Norwood: Now, when you added 38727 that 15 cents, that was an f. o. b. mill price, was it?

The Witness: Your Honor, that was on this

basis: Assume that the rail delivered price in Petoskey was $2.25, the rail rate was 25 cents, we arrived at that figure by taking the $2.25 price and deducting the rail rate of 25 cents to make it $2, and then added the 15 to that.

Trial Examiner Norwood: I see.

By Mr. Withrow:

Q. So that under that hypothetical situation the dealer who came to your mill got it 10 cents cheaper?

A. Correct, and had the advantage of picking up one bag or a thousand bags, whereas the other way he would have to take a minimum car.

Q. Now, that applied to other dealers from other points than Petoskey, didn't it?

A. Yes.

Q. And you continued to have this 15 cents up over the mill net for Petoskey?

A. No, that was discontinued for a time. We have a modification of that, or a mill price at the present time. In some respects it works out about on the same basis, but it does not bear any relationship to a 15-cent charge, or to any rail rate involved. It is simply a price at the plant that we are willing to accept if anybody came to get it.

Q. Now, how does the expense in loading these 38728 trucks compare with your cost involved in rail shipments?

A. Well, in these small lots, when they are running in and out all the time, it is higher, because we frequently had to discontinue loading cars, switch from cloth bags to paper bags, or vice versa, and interrupt orderly loading of car shipments.

Q. Now, to have the record clear, have you always allowed trucking from your silos from the time they were built?

A. Yes.

Q. And were they built specifically with the trucking of cement in mind?

A. Yes.

Trial Examiner Norwood: That 10 cents was not a net advantage to them, was it?

The Witness: No. They had a certain handling involved there.

Trial Examiner Norwood: That would involve the cost of operating the truck.

The Witness: In practical operation, however, it is mostly a net advantage to them, because the proximity of the plant to the market was such that they could take it up there almost as readily as they could at their own warehouse and deliver it where they wanted.

By Mr. Withrow:

Q. So they could deliver with these trucks to the jobs?

A. That is right.

38729 Trial Examiner Norwood: Well, that arrangement did not give you any trouble, did it?

The Witness: No.

By Mr. Withrow:

Q. When your mill was built near Petoskey, was it designed to take care of rail shipments or truck shipments?

A. Rail shipments exclusively.

If I may, I would like to add to that by way of explanation that the plant sets in the quarry. We have a very difficult situation from the standpoint of trucking out of there, because of the incline from the mill up to the highway level, and it was not until after that road on our own property had been quite materially improved that some trucks could get out of there at all.

Q. Now, did you ever enter into any agreement with anyone not to truck cement in the Upper Peninsula?

A. No.

Q. And I believe I was interrupted when I started to ask you why you do not truck cement in the Upper Peninsula.

A. Between the Upper and the Lower Peninsula there is a ferry service, and those ferries are not adapted for those heavy loads of cement. In addition to that, there would be the delay, and it is out of the question to truck up there advantageously. Also the fact that the eastern end of the Upper Peninsula, which would be the only market of any consequence for us to truck in, is

38730 very sparsely populated. There is practically no market there to solicit business in.

38731 Q. Now, have customers ever demanded quantity discounts from you, Mr. Lucas?

A. Frequently they asked for them, yes.

Q. And what is your practice?

A. We do not give them.

Q. And what is your reason for not giving a quantity discount?

A. Well, I do not know where we would stop with a quantity discount. If we offered it, say, on five thousand barrels, why, I think practically every order that came anywhere from three thousand up would be given to
38732 you on a five thousand barrel basis, and we would probably discover later on that we are not going to ship the balance of it.

Q. Have you had a large volume of business from the United States Government?

A. No.

Q. About how much have your sales and shipments to the Government amounted to?

A. I would estimate roughly, since the starting of the plant, probably in the neighborhood of 75,000 barrels.

Q. Mr. Lucas, I show you Respondents' Exhibit 2948-A. to 2948-Z-7, and ask you to tell us what it is.

A. A copy of a bid made to the United States Government. We made the bid.

Q. Is that the so-called Good Friday bid?

A. I heard it referred to as such.

Q. Will you turn to the pages where you inserted figures.

(The witness does so.)

Q. Those are the figures that you included in your bid to the United States Government?

A. Yes.

Q. Who determined the prices which would be
38733 bid by the Petoskey Company?

A. Mr. Galster and myself.

Q. Did you have any agreement with any competitors as to how you would treat the Good Friday invitation of the United States Government?

A. No.

(The foregoing testimony beginning "Did you have any agreement with any" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

38734 Trial Examiner Norwood: The stipulated testimony is as follows:

(1) I am, at the present time, vice-president, sales manager, and traffic manager of the Petoskey Portland Cement Company. In 1922, I first became associated with this

company as assistant sales manager and as assist-
38735 ant traffic manager. The following year I was made sales manager and traffic manager of the company, which positions I have occupied ever since. In January, 1937, I was made (a) vice president of the company. I am also a director of the company. I am not an officer or a director of any other cement producing company. With the exception of the Petoskey Cement Sales Company, of which I am a director, I hold no position with any cement marketing company.

(2) Prior to 1922 I was associated with the Ideal Engine Company of Lansing, Mich. This company manufactured machinery and equipment used in the construction industry but was not affiliated with any cement producing company in any way. Before this I was associated with the Lansing Company of Lansing, Mich.

(3) The Petoskey Company was organized on February 5, 1917, as an independent company; it has never been a subsidiary of any other corporation. At the present time it has outstanding capital stock in the amount of $2,000,000.

The following are the other officers of the company:
John L. A. Galster, president and treasurer;
Homer Sly, vice president;
J. C. Buckbee, vice president;
G. W. John, vice president and general manager;
E. C. Nyman, secretary.

(4) The company owns all of the capital stock,
38736 except the qualifying shares held by the directors of the Petoskey Cement Sales Company, a corporation organized pursuant to statutes of the State of Wisconsin. Its principal place of business is Petoskey, Mich., and it operates a packing plant at Milwaukee, Wis.

(5) The officers of this subsidiary are:
John L. A. Galster, president and treasurer;
J. C. Buckbee, vice president;
George W. John, vice president;
Homer Sly, vice president;
H. H. Lucas, vice president;
E. O. Nyman, secretary, and
R. P. Bremmer, general manager.

(6) The Petoskey Cement Sales Company was organized in 1929 for the purpose of distributing Petoskey ce-

ment in the State of Wisconsin. For some years prior to that time we had been selling cement to dealers in Wisconsin but we determined that we would be able to transport our cement to Wisconsin more economically if we established a plant there. The Wisconsin Company was organized to secure whatever benefits would accrue to a local company.

(7) The Petoskey Portland Cement Company is not affiliated in any way with any other cement manufacturing company.

38737 (9) The Petoskey Portland Cement Company owns and operates one mill located at Lamson within three miles of Petoskey, Mich., on the northeast shore of Lake Michigan. We own and operate a silo at Chicago, Ill., a silo at Detroit, Mich., and we supply a silo located at Milwaukee, Wis., which is owned and operated by the Petoskey Cement Sales Company of which I have already spoken. To each of these silos we ship finished Portland cement in bulk by water. Our cement is packed after arrival at these silos and distributed from them.

38738 (13) Petoskey manufactures standard Portland cement, mortar cement, high early strength cement and waterproofed cement.

(14) The company is not affiliated in any way with any other cement manufacturing company and does not have any working agreements with any other cement manufacturing company by virtue of which one company supplies the orders placed with the other company.

(15) Construction on our three silos was begun in 1928 and completed in 1929 at which time each of them began operating. Prior to 1928 we had transported cement in packages by boat to Milwaukee, Detroit, and other lake ports. We found this method of transportation was

38739 very costly as compared with shipping cement in bulk and determined that we could effect a considerable saving by the construction of bulk plants and the shipment of our cement to these plants by water in bulk.

(17) The Petoskey Portland Cement Company normally solicits cement business and ships cement into Michigan, Wisconsin, southeastern Minnesota, and northern Illinois. Occasional shipments are made beyond.

(18) In determining the area in which we will normally solicit business, we consider the following: 1. the freight rate, 2. the cost of operating our silo or warehouse, and

shipment from our mill to the silo or warehouse, 3. the volume of business available in the territory adjacent to our mill, 4. the mill net we would realize, 5. the cost
38740 of securing the business, 6. the volume of business available in a distant market, 7. the service Petoskey is able to render in comparison with the service from competing companies, and 8. the long-term or future relationship with purchasers in that market. For this reason we are often ready to ship into territory outside of the area in which we solicit, but it is a territory in which it would not be profitable for us to exert any sales effort.

(19) We do not set a minimum mill net figure below which we will not go in handling our sales. Each prospective order, when it comes in, is handled on its own merits. If the net is too low to suit us under all the circumstances, it is not accepted. In determining whether an order will will be accepted there are many factors to be taken into consideration, such as the customer requesting the shipment, the freight rate to the destination, the volume of business booked under other contracts, and the amount of shipments made by us during that shipping season. The element of the service which we are in a position to render tends to discourage distant shipments.

(20) Petoskey's best markets are Detroit, Chicago, and Milwaukee. A very large proportion of the cement sales by Petoskey is made to small dealer accounts which dealers are located in small towns.

(21) At all of the large consuming points in the territory where it solicits business, Petoskey finds eight
38741 or more competing companies actively engaged in soliciting and selling cement.

(22) Petoskey sometimes follows a contractor out of its normal sales territory if the job is attractive and in order to maintain its connection with that contractor.

(23) Generally speaking, Petoskey tries to keep its contacts with all the trade it has shipped for a number of years, in an effort to hold that trade and to maintain its position with those dealers and customers where it has built up good will as a result of time and money expended by the company.

(24) Petoskey follows friendly contractors to points beyond its normal sales territory wherever it can get a satisfactory mill net, because the sales cost on such business is low and it continues a valuable contact with a reasonable certainty of obtaining the business.

(25) Petoskey has never solicited business or made sales in the State of Mississippi.

(26) The Petoskey Portland Cement Company comes into competition with all of the cement companies that are located in the State of Michigan and these are:

Aetna
Consolidated
Ford
Huron
38742 **Peerless**
Wolverine.

(27) We also find the following companies located outside the State of Michigan soliciting business in our marketing area:

Lone Star
Penn-Dixie
Universal Atlas
Marquette
Medusa
Lehigh
Alpha
Dewey
Manitowoc
Wabash
Hawkeye
Northwestern States.

(28) The Petoskey Portland Cement Company obtains its information concerning the published and unpublished cement prices of its competitors by means of information picked up in the field by its salesmen in the regular course of their calling on the trade. Its salesmen operate under instructions to transmit to the home office immediately any changes in the competitive practices or prices which they may find or hear of in the field. Petoskey has found
38743 that friendly dealers are willing to turn over to our salesmen copies of price quotations received from our competitors. Its salesmen send to the home office all quotations of price changes or announcements of policy changes that they can pick up in the hands of customers. Petoskey also gets much information of competitive moves directly from such customers by way of telephone calls or letters. Another source of such information is tabulations of bids submitted to govern-

mental agencies which are obtained by salesmen who attend the lettings, or from reports of the bids published by news service companies. As soon as I get any knowledge of a change in price by any of the ways listed above I telephone my salesmen and ask them to check the quoted prices and see what they find.

(29) It does not take a very long time for Petoskey to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are in the hand of the consuming trade. In all cases, the lapse of time is very short, and never more than a day, before Petoskey is fully apprised of competitive moves through the information which its salesmen are able to obtain in the field.

(30) Petoskey has found building material dealers and contractors whose business it solicits, to be well informed as to the delivered prices quoted on cement by its lf and its competitors. It finds that purchasers compare
38744. the prices quoted by the various cement companies and keep in touch with the various sources of supply. It also finds that it is the practice of contractors to shop around to make sure that they obtain the lowest price quoted in any given market.

(The foregoing testimony beginning "(28) The Petoskey Portland Cement Company obtains" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

(31) In the company's experience it has not found either a dealer or contractor willing to pay more for Petoskey cement than for a competitor's brand.

(32) From the company's experience in selling cement, it has found that it cannot sell cement for more than its competitors and it has also found that it cannot permit any competitors to sell cement in any market at a price less than that quoted by Petoskey, or else Petoskey will be eliminated from that market.

(33) In the event of a decline of price, Petoskey has found that its regular dealer and contractor customers ordinarily give it an opportunity to meet the lower prices quoted by competitors if Petoskey wishes to do so.

(34) In the course of our daily operation, dealers normally telephone in their orders for cement. At the time the dealers make such orders there is usually no discussion of price, except at the time of a price change. The dealer is invoiced at the last price we have quoted to him. If that price is higher than that quoted by any other company to

that dealer, the dealer brings it to our attention and we meet the lower price to retain the dealer's business.

38745 (35) I have found that dealers report to salesmen immediately information concerning price decline, at which time they usually request to have their recent orders protected and invoiced at the new low price. We have generally followed this procedure on shipments made five days before the decline.

(36) I have also found that in the event of a price advance, the dealers immediately bring that to the attention of our salesmen in an effort to find out whether or not they have to protect themselves on future shipments of our brand of cement. At the time of calling an increase made by one company to the attention of our salesmen, dealers usually request information as to whether or not we intend to follow along with the price increase. They also request information as to whether or not we will protect them on certain specific jobs which they have sold to contractors or others.

(37) In the event of a change in price Petoskey generally learns of the change in price at all of the important markets where a change was made. All out-of-town telephone calls and telegrams about price changes and placing of orders are generally made with the charges collect.

(38) Upon receiving the first information about either a new quotation above or below the market, we advise our salesmen to check all the delivered prices quoted at the various destination points in their territory. Our salesmen check the prices quoted by each of our competitors

38746 in an attempt either to confirm the old price or to ascertain what changes have been made at all of the important points where Petoskey cement is consumed, and we always contact the dealers who consume large amounts of our cement. This information is then telephoned and forwarded to the home office where we take the various quotations we have received, and we compare the delivered prices which have been quoted.

(39) During the time that I have been with the Petoskey Portland Cement Company, the comparison of the delivered prices has shown that a flat price for cement sales was quoted at all of the points in some area such as the lower Peninsula of Michigan or the three counties around Detroit, and we assumed that this price existed for the entire area until we found information to the contrary. At other times the delivered prices appear to form a pat-

tern around some mill, or other shipping point, the delivered prices varying in accordance with the amount of the freight rate from that mill to the various destinations. We then carefully check to ascertain whether or not there is a uniform net at this company's mill or silo for any given territory, and if there is we assume, until we find delivered prices reflecting some other condition, that the competitor intends to limit himself to that net—sometimes called a base or price base or so-called base price—on all of his business.

(40) With that information as to the mill net or
38747 base, we attempt to anticipate the delivered prices which that company will quote at other points and we issue quotations either meeting the change or restating our own prices.

(41) Upon issuing quotations to points at which we have no specific information as to what prices are quoted, we have no assurance that our price will meet the prices quoted by the company initiating the price change. We are sure, however, that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than any of our competitors they would be forced to meet our low quotations. In addition, if our quotations were lower or higher, our salesmen would probably be advised of this fact on their calling upon the trade.

(42) When we broadcast quotations, we send them to all our cement dealers and prospective cement dealers, but we do not send them to any of our competitors. We also do not receive quotations mailed direct to us from competitors.

(43) It is the usually practice of the Petoskey Portland Cement Company to quote destination prices. This has been the practice as long as I have been connected with the company. It has also been the practice to meet the lowest delivered prices which we found quoted in any market in which we wish to sell.

(44) Petoskey is merely a price follower, and in gen-
eral has met the destination prices which it found.
38748 (45) In arriving at its delivered prices for the various destinations where it sells cement, Petoskey recognizes that the market price at many points usually reflects some base or basing point. Petoskey, however, quotes the lowest quoted price at each point where it sells

cement regardless of whether or not the delivered price appears to reflect a base.

(46) The Petoskey mill is a so-called "non-base mill." Petoskey is free to make its mill a base mill at any time, if it should decide that it was advisable.

(47) It has been the usual practice of the Petoskey Portland Cement Company to quote and sell its cement for delivery f. o. b. destination. The reason that Petoskey now follows that practice is that we are usually asked to quote a delivered price, and our experience has been that the purchaser is interested in the price at the point where the cement is to be used and is not concerned with a price at our mill. I have always found that the competition we had to meet was at the point of use.

(48) Petoskey quotes delivered prices to enable it to compete with other manufacturers and to enable its dealer and contractor customers to compare its quoted prices with the prices or delivered costs quoted by its competitors.

(49) I recall of very few requests by our dealers or contractors for prices f. o. b. mill as these are only when a customer wants to truck the cement. Dealers and
38749 contractors almost invariably request prices f. o. b. destination.

(50) Although in a few instances Petoskey has received requests from departments of the Federal Government for bids f. o. b. mill, the Federal and State governmental departments usually request Petoskey to bid on an f. o. b. destination basis.

(51) Petoskey has no policy against making sales f. o. b. mill and would consider making sales f. o. b. mill to any purchaser under satisfactory circumstances.

(52) Each salesman is empowered to quote prices, but these prices are subject to confirmation by the home office. Each Petoskey salesman generally knows the company's price at all destinations in his territory, and he quotes that price to customers there. If he finds competitors' prices different from those he is quoting at some of these points, he consults the home office. In the event of a change in price, Petoskey receives information and collects quotations concerning the new announced price or prices, at all of the important destinations at which it sells cement, and then informs its salesmen as to its new delivered prices. Our salesmen ordinarily do not have any occasion to compute or calculate delivered prices at the major points of cement consumption within their territories, since infor-

mation as to the lowest quoted delivered prices become a part of their general information resulting from day-to-day solicitation of the trade.

38750 (53) On all governmental work, both federal and State, Petoskey usually bids its regular commercial price at any particular destination. On some occasions Petoskey has bid lower. The reason for this practice is that Petoskey has never felt that the Government is entitled to any lower price than its regular trade, and that it believes that a lower price to the Government would react unfavorably with Petoskey's customers. One of Petoskey's reasons for not giving a special price to the Government on any particular letting, is that Petoskey believes that its customers would seek similar price considerations. Petoskey respects the views of its dealer and contractor customers because it has to rely on their regular business. Government business is spotty and never results in what can be called "having a customer"—that is, a regular year-in and year-out customer.

(54) In filling out an invitation to bid to the State or federal agency we look at our destination price file and insert in the bid blank the price which is shown on our price cards.

(55) During the N.R.A. Code period, we bid the lowest price which we found on file with the Code Authority.

(56) During my experience in the cement industry, I have observed a great number of reductions in delivered prices at points where the Petoskey Portland Cement Company markets cement. Whenever we met such reductions in price we have found that our volume

38751 of business in such markets has not been increased, and we have found that after such reductions our customers and prospective customers have reduced the amounts of their purchases. I have always observed in the case of price declines that practically all of the companies competing with Petoskey have met the reduction in prices in the affected markets within a few hours and that Petoskey has neither increased the amount of its orders in such markets nor increased the proportion of sales it makes to the total amount of going business at such markets. In the case of those price reductions experienced by the Petoskey Company, I have not found that the company initiating the price reduction has been able to take any substantial amount of business away from

the Petoskey Portland Cement Company whenever we have met the lower prices. It has been the usual practice of Petoskey to meet such lower prices, and Petoskey has found that it could not sell cement at the old and higher prices.

(57) From time to time I have also observed increases in delivered prices in territory where Petoskey markets cement and I have found that when an increase in prices is announced by one company and followed by other companies that our customers in such markets have usually increased the volume of their purchases. Such purchases are made at the low prices existing before new and increased prices become effective.

(58) We protect our purchasers, both dealers and contractors, who are interested in specific business by
38752 entering into specific job contracts or special sales orders. These contracts or sales orders protect our purchasers on such business in the event of an increase in price, and I find that we do not receive the benefit of a price increase on such business for a number of months. In the event of a price decline, sales are immediately made at the new low price, and in the event that any substantial amount of shipments are made immediately before the decline, it has been our practice to reinvoice such shipments so that the purchaser got the benefit of the low price.

(59) In the territory in which we normally solicit business, I know of no instance where we have not been aware of an openly quoted change in price, especially a price decline, within a few hours after it had originally been received by the dealer trade.

(60) Petoskey normally sells at its openly quoted price. From time to time, it has found that it was impossible to make sales to a friendly contractor or dealer at Petoskey's openly quoted price. In such cases there had been nothing in its previous relations that would account for his not doing business with Petoskey. Petoskey has then considered making reductions or deviations from its openly quoted price, and in some instances has made such deviations. The reasons for considering such de-
viations and in some instances making them, has
38753 been the fact that Petoskey believed that a competitor had offered to this friendly dealer or contractor a price lower than Petoskey's quoted price or lower than any other openly quoted price.

(61) In the regular course of their work our salesmen are instructed to report to me any evidence which they may find of the existence of secret concessions in price or terms and conditions of sale. Reports are brought to my attention at the time and we make every effort to check in so far as possible as to the accuracy of such reports.

(62) I have also had friendly contractors offer to buy from me in the event that I offered them as favorable a price as they were able to receive from competitors and have been unable to make a sale to them either at the market price or at a price below the market price.

(63) I have also found from time to time that dealers have bid to State or Federal Government prices equal to or below the lowest quoted market price of the cement manufacturer on whose brand of cement the bid was submitted.

(64) On jobs involving substantial quantities of cement in all my cement experience, special prices or terms have frequently been available to the user of large quantities of cement. These prices were at figures less than the lowest published market prices or with more 38754 favorable terms. Petoskey prefers to sell at its quoted price at any given point, but on occasion it has met secret prices when it has been necessary to maintain its position in the market, and has made special prices in an effort to anticipate its competitors quoting secret prices. Friendly dealers and contractors of the Petoskey Company tell our salesmen or tell me in the event that they have been offered a special concession from one of our competitors, and have given us the opportunity to meet such concessions. From time to time, Petoskey has made price concessions to contractors on large orders in an endeavor to meet the competitive situation which it found in connection with that particular job.

(65) The dealer is Petoskey's most important customer. The percentage of business that Petoskey sells through its dealers is around 80 to 85 percent. The importance of the dealer has had a tremendous influence on Petoskey's marketing methods and policies. Petoskey is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's good will, and giving him a price and terms that will enable him to compete with other dealers selling in the same consuming area.

(66) The Petoskey Portland Cement Company requires its dealers to be persons with whom the purchasing public trades in buying cement and other building materials. Before deciding whether it will sell
38755 someone as a dealer, Petoskey tries to ascertain whether in its judgment he carries on hand a stock of building materials commensurate with the requirements of the locality where he is located, whether he is equipped to give service in the distribution of our product, and whether or not he has a good credit standing. Petoskey has made it a practice to investigate prospective dealers carefully to see whether or not they are in a position to assist in the marketing of Petoskey cement.

(67) The question of whether we will sell a given dealer, varies depending upon whether or not Petoskey has adequate dealer representation in a given market and upon the size and needs of each market.

(69) Our concept of a dealer has been in effect since I have been with the company.

(70) Petoskey sells through dealers only when sales through established dealer channels seem fair and logical and where dealers render a service to the ultimate consumer. Petoskey also sells direct to contractors, ready-mix plants, concrete products plants and to the State and Federal Governments.

(71) Article XI of the N.R.A. Code made no substantial change in the marketing practices of the Petoskey Portland Cement Company. After Article XI was
38756 suspended, Petoskey continued to sell on substantially the same basis as before.

(73) I have always made my terms at least as favorable as any granted by my competitors because I could not compete as long as I was offering terms which were less advantageous than those offered by other manufacturers. From experience I have found that whenever one of my competitors started giving terms which were more favorable than mine that I had to adopt the change and my reason for not granting more liberal terms myself is that I know from past experience that it would not be more than 24 hours before my competitors quoted terms as favorable as mine or even more favorable.

(74) Since 1921, the Petoskey Portland Cement Company has issued quotations to the dealer trade to whom we sell or from whom we solicit business whenever there

is a change in price or in terms or conditions of sale. In addition, there have been occasions when we have issued quotations when there was no change in price. This is done in order to keep our brand before dealers whom we do not regularly sell.

(75) In the event of a reduction in price which we decide we will meet at a given destination, we normally authorize our salesmen to meet this reduction prior to a dealer's receipt of our quotation. Under such circumstances we confirm the price quoted by our salesmen by means of a letter.

(76) Petoskey Portland Cement Company has
38757 received copies of statistical reports sent out by The Cement Institute. This information consisted of a monthly statement of production of clinker and cement and cement shipments during the previous month with stocks on hand at the end of that month. This information was distributed to us by The Cement Institute without any comment. None of this statistical information had any reference whatsoever to price or any elements of price.

(77) I looked over this statistical information to see whether anything contained in it might be of interest to us. Generally speaking, I used it merely as a means of keeping posted on matters of general information. I also received Government reports made by the United States Bureau of Mines which covered substantially the same ground, but which were received at a considerably later time.

(78) Salesmen of the Petoskey Portland Cement Company are given copies of The Cement Institute freight rate book. They are also given information concerning the base points and base figures that we determine from prices we have picked up in the field.

(79) We also use The Cement Institute freight rate books in the home office as a source of freight rate information. This information is used in the place of compiling freight information from the official railroad tariffs and is employed because it is a cheap and convenient method of securing the information.

38758 (80) We employ the freight rate books to determine what the rate will be on shipments moving from our mill. We use the information to assist us in determining whether our mill net would be sufficient to make

a given piece of business attractive. We use the information in the event of a change in price to assist us in determining whether or not there is a pattern of prices which figure back to some mill as a base plus the freight charges. In the event of a general change in price level, we also use the information in an effort to anticipate the delivered prices at those points where we have not as yet secured specific information as to what destination prices have been quoted.

38763 Trial Examiner Norwood: Received as marked. (RESP. EX. 2948-A, 2948-B, 2948-T, 2948-U, 2948-V, 2948-W, and 2948-Z-7, was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Lucas, would you look at this exhibit and tell me briefly the basis on which you arrived at the
38764 prices which you quoted?

A. In connection with this bid, we offered cement at a dollar and a half at the plant. Do you want me to go on and explain?

Q. Yes, how about at the silos.

A. At the silos the bid was a dollar and a half, plus 25 cents transportation charges and overhead in connection with operations at the silos, and that was true of all three silos at Milwaukee, Chicago, and Detroit.

Q. And those were bids f. o. b. your silos?

A. F. o. b. the silos and f. o. b. the plant, and that bid, of course, of $1.50 and $1.75, was subject to 10 cents per barrel cash discount, 15 days.

Q. That is, stripped to package?

A. That is stripped to package.

Q. Do you have any inquiries from the Lighthouse Service of the United States Government?

A. Yes; occasionally.

Q. How do you sell them?

A. We usually sell them f. o. b. their lighthouse tender at our plant. They come right to our dock.

Q. And do you come into contact with any land-grant rates?

A. There are some there, but we have very little use for them.

Q. When you do, where do you get the land-grant rates?

A. Pere Marquette Railroad.

38765 Q. Did you get an award in the so-called Good Friday bids?

A. No.

Q. I show you Commission's Exhibit No. 1394, and ask you if you received that invitation (handing the exhibit to the witness)?

A. We may have received one of those, but this does not refresh my memory of ever having received it.

Q. At the time of that invitation, were you making sales of cement down in West Virginia?

A. No.

Q. Or even in Ohio?

A. No.

Q. Then, if you cannot recall, I do not suppose you can tell us why you did not bid on that?

A. The probability is that we decided not to bid because we do not operate or sell in that territory.

Q. Did any of your dealers comment or make reference to you concerning your bid on the Good Friday invitation?

A. Yes.

Q. Would you tell us what position they took?

Mr. Wooden: Objected to as irrelevant and immaterial.

38766 Trial Examiner Norwood: Objection sustained.

Mr. Withrow: I offer to prove through this witness that subsequent to the bid made by the Petoskey Company, in answer to the Good Friday bids, the invitation being Commission's Exhibit 1339, that dealer-customers of the Petoskey Portland Cement Company criticized the Petoskey Company for having made a bid, and expressed as their ground of criticism that some of the cement requested was cement that the dealers were entitled to handle, and would normally handle in the regular course of business.

Trial Examiner Norwood: Proceed.

Mr. Wooden: I am willing to agree that the witness would so testify.

By Mr. Withrow:

Q. Do you come in competition with imported cement, Mr. Lucas?

A. No.

Q. Have you ever entered into any agreement with any of your competitors concerning imported cement?

A. No.

38775 Q. Now, Mr. Lucas, in answer to the Burns and Clark questionnaire, there was a question saying, as I recall: Have you any criticism of your method of quoting prices? And you answered: Yes; some dealers had complained because, being located close to the mill, they paid the same as those located further away. Do you recall that generally?

A. Yes.

Q. Would you mind explaining to the Examiner what situation you had in mind, and what the complaint was?

A. Yes; I think I can remember what I had in mind in connection with that question there. That was during the Code period, and the supply dealers had a code of their own. Apparently, at some one of their code meetings, or something, they must have been discussing among themselves the relative prices that they had paid in their respective communities for cement, and if I am not mistaken, one dealer raised the point with us as to why someone at the more distant point could buy cement at a price as cheap, or maybe cheaper than he could in Petoskey.

Q. Was that the only instance that you recall?

A. That is the only one that I recall.

38776 Q. Now, Mr. Lucas, have you delivered cement by truck to points where there are no rail facilities?

A. Yes; we have quite a few of those in the northern part of the Lower Peninsula now, particularly because the number of old railroads that started as logging railroads have been abandoned, and on some of those there are still some fairly representative communities that have no rail service at the present time.

Q. What price do you quote at those points for truck delivery?

A. We meet the competitive prices that we find at those destinations.

Q. That is, you specifically check those?

A. That is right. That is the only way we can do it.

Q. Mr. Cree testified that you were present at some sort of meeting that was supposed to have been held in Mr. Emil Stroh's office. Have you attended any such meeting?

A. Never was in Mr. Stroh's office.

Q. Do you know Mr. Stroh?

A. Never met Mr. Stroh.

You refer to Mr. Stroh?

Q. Yes.
A. Of the Wabash?
Q. Emil Stroh, of the Wabash.
A. Who is dead now?
Q. Yes.
A. I never met the man.

38779 Q. Mr. Lucas, do you recall having received an invitation for cement to be used at Rolling Fork, Miss.?
A. No.
Q. Do you know whether or not you bid on such an invitation?
A. I am quite sure we did not.
Q. Do you normally bid on invitations from Mississippi?
A. No.

38780 Q. Commission's Exhibit 45, Mr. Lucas, shows that you were present in December, 1935, at a meeting at which Mr. Johnson made a statement concerning the policy of the Aetna Company. Do you recall that meeting?

38781 A. I remember being at a meeting at which Mr. Johnson made some reference to their policies; yes.
Q. And after he made the announcement, did you discuss or agree on that policy with Mr. Johnson?
A. No.
Q. Did you know why he asked you to attend that meeting?
A. No, I did not.
Q. Would you tell us whether, to your knowledge, any agreement was reached by anyone at that meeting?
A. No.
Q. Do you recall under what circumstances you happened to be there?
A. No. I am quite sure I was not invited by Mr. Johnson, but somebody invited me into this meeting. I don't remember the circumstances other than that.

38782 Q. Were you ever asked to enter a meeting where Mr. Johnson made a similar announcement of policy?
A. No. In fact, the whole procedure was very unusual, as far as I was concerned. He appeared to be taking some of his own personnel to task, and sort of serving notice on them that he was assuming some active direction in

the management of the concern, himself. It seemed very unusual to me.

Q. The record shows that you have a silo at Milwaukee. Did you ever agree with anyone as to what the price level in Milwaukee should be?

A. No.

Q. Did you ever agree that the price should be high enough so that the Dewey Company could come into Milwaukee?

A. No. We would be glad to have them out.

Q. Mr. Lucas, I know you Commission's Exhibit 23-A, and ask you if you recall ever having attended the meeting referred to in that document?

A. No. This does not refresh my memory with regard to any meeting.

Q. Do you recall any meeting on trucking in Chicago that you attended at any time?

A. No. I recall some discussion of trucking in a group prior to the—during the formation of the code, but there certainly was no two-day meeting such as this speaks of here, and apparently that could not be referring to the same thing.

Q. Did you ever see that document before this case started?

38783 A. No.

Q. Mr. Lucas, I show you Commission's Exhibit 2949-A, and ask you if that is a letter which you received or which the Petoskey Cement Company received?

A. Yes.

38787 By Mr. Withrow:

Q. Mr. Lucas, can you tell me when you first had an f. o. b. mill price for truck delivery at the Petoskey mill?

A. No, I do not know that I can tell you offhand.

Q. I show you Respondents' Exhibit 2949-C, and ask you if you can refresh your recollection from that document as to when that was?

A. This is January 1, 1922.

Q. Is that about the time the mill was first opened?

A. Oh, the mill was started in 1921, the spring of 1921.

Q. And when did it first ship cement, do you recall?

A. I think in April, 1921.

Q. Now, when did you first start to—when did you first have an f. o. b. mill price at your Detroit silo for truck delivery?

A. Well, we had a warehouse at Detroit prior to the time we had a silo there.

Q. A warehouse?

A. That was as of October 25, 1925.

38788 Q. How about the silo in Chicago?

A. The one in Chicago was opened as of April 26, 1929.

Q. Was that about the time you opened the silo, itself?

A. Correct. The silos were all built during the winter of 1928 and 1929, and were ready for opening in the spring of 1929.

Q. And when did you first have an f. o. b. mill price at the silo at Milwaukee?

A. May 1, 1929.

Q. And that was again about the time—

A. That is when it opened; that was the very beginning of the silo.

38789 Q. Now, I show you, Mr. Lucas, Commission's Exhibit No. 3123-D, and your answer to question 10, that says "Our base Lamsen, Mich.," and has some figures under that. Will you tell us whether that indicates a base f. o. b. mill price?

A. That is f. o. b. mill price.

Q. And Lamson is the rail name of the point 38790 where your mill is located?

A. Correct.

Q. A few miles from Petoskey?

A. Correct; just outside of Petoskey.

Q. To your knowledge, does the Aetna Company have some sort of warehouse at Menominee or Marionette?

A. Yes.

Q. And do they truck from that warehouse?

A. Yes, they do.

Q. And to your knowledge was there ever a time when they did not truck from that warehouse?

A. No, not to my knowledge, not since they started taking cement in there by boat.

Q. And did you ever enter into any agreement with anybody that was to the effect that Aetna should quit trucking from that point?

A. No.

Q. Do you remember the plan for sharing available business during the N. R. A. Code for the Cement Industry?

A. Yes.

Q. What stand did the Petoskey Company take with reference to that so-called plan?

A. Why, the plan never got far enough so that we even gave it serious consideration. We never took any stand.

38791 The witness identified Resp. Ex. 2952 as a Petoskey announcement of sales policy Petoskey put out in March, 1931.

(RESP. EX. 2952 was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Lucas, I show you Respondents' Exhibit 2953, and ask you to tell me what it is.

A. This is one of our quotations to a Milwaukee dealer that in turn was picked up by one of our own men, Mr. Bremner and returned with a memorandum on it.

Q. Would you tell us if your salesmen do check to find out if your prices—specifically, your quotations—are as high or higher than the quotations of other companies?

A. Yes, they do.

38792 Q. And is that the routine manner in which matters would be taken care of?

A. Yes. He was calling our attention to the fact that we were quoting five cents higher than our competitors.

Cross-Examination by Mr. Wooden.

Q. Mr. Lucas, I understand that your mill at Lamson has never been a basing point.

A. Correct.

Q. But you have made it a general practice to sell and price your cement on a delivered price basis with reference to existing basing points?

A. Well, we have met destination prices, Mr. Wooden.

Q. But you have found, have you not, as stated in your stipulated testimony, that your destination prices are ordinarily the reflection of some basing-point price plus freight from that basing point?

A. At times—

Q. I believe you said, Mr. Lucas, that at times

38793 that was the case.

A. At times the destination prices do reflect a uniform net at some one mill commonly referred to as a basing point.

Q. Now, as a matter of fact, hasn't it been the exception when the prices at various destinations were other than the reflection of some base price plus freight?

A. Not necessarily the exception, Mr. Wooden. We have had some of that territory, lots of flat zone prices.

Q. Yes, I am referring to that, but I say you have had those flat zone prices throughout the State, the Lower Peninsula of Michigan in 1937, didn't you?

A. Yes, and later.

Q. And you had flat zone prices in Wayne County around there, around Detroit, haven't you?

A. Yes.

Q. But leaving those instances and cases out of consideration, haven't you found that ordinarily the delivered prices were the reflection of some base price plus freight?

A. Well, I would say frequently yes, very frequently.

38794 Q. Well, isn't it ordinarily the case outside of those exceptions?

A. Well, there are other exeptions.

Q. Would you name them?

A. Yes. I think I stated to Mr. Withrow that there was quite a number of destinations in the northern part of the Lower Peninsula there where old railroads used to be, and they have been abandoned now, and those have —could not be worked back to anything like that.

Q. Adding such exceptions, then what is the situation?

A. Well, we have had in—we found also into Cook County, the territory around Chicago, some prices that did not reflect the actual freight rate from the base.

Q. Well, that has been well shown in this record, that there are a number of places like that that have arbitrary prices, so-called artibraries, but take the larger number of the destinations at which you deliver cement, isn't that ordinarily the delivered price there equivalent of some basing-point price plus freight?

A. I would say that was frequently true, but you could not depend on that.

38795 Q. You say frequently it would be true, but you could not depend on it?

A. Yes.

Q. But don't you depend on it, as a matter of fact?

A. No.

Q. Don't you assume, as you state in your stipulated

testimony, that you can apply the mill net that figures back to a consistent figure at a given mill in applying that to other destinations?

A. We have.

Q. You act upon the assumption that that will make the price at the other destinations, don't you?

A. That is right, at times.

Q. Do you mean to say that, after taking out those cases that you have described, that you cannot depend upon the price at given destinations being the equivalent of the base price plus freight?

A. Well, I say this, Mr. Wooden, that if we were quoting on a substantial quantity of cement I would not depend upon that, no, in its entirety.

Q. In its entirety; how about carload business in general?

A. We frequently make quotations on the carload, yes.

Q. In that way?

A. On that basis.

Q. And particularly in your business with dealers, isn't that true?

38796 A. Yes.

Taking your dealer business by itself, don't you find or haven't you found that ordinarily the delivered price to dealers at given destinations was the equivalent of some base point price plus freight?

A. Frequently.

Q. I asked you whether ordinarily it is.

A. Well, the term "ordinarily," I do not know just what you mean, Mr. Wooden, how broad that might be; I will say quite frequently, yes, that is true.

Q. Well, in how many cases, say, during the year 1936, for example,—how many cases wasn't it true in your territory?

A. Oh, I could not tell you that.

Q. You do not have any idea of what percentage of cases it was true or was not true?

A. No.

Q. Well, you applied, as I understand it from your stipulated testimony, after you find that a given price figures back to a consistent figure at some mill, you apply that to other destinations where you do not have any information?

A. At times, we do.

Q. And in that respect you use the basing-point system for calculating your prices, do you not?

A. Well, I do not think we do. I think it is des-
38797 tination price that we are interested in.

Q. But when you apply the basing-point price that you calculate, plus the freight, you say that you are not using the basing-point system?

A. Possibly we are in a modified way, but after all what we are interested in is meeting the destination price.

Q. And that is the method you take of meeting it, is to use that basing-point price, plus freight, isn't it?

A. No, it is not, because we might find our price was high on that basis.

Q. But that is what you go on, that is the method you use in quoting, isn't it?

A. In some instances, yes.

Q. Will you produce and submit to the Examiner instances in the year 1936 where you quoted other than the equivalent of a basing-point price plus freight to dealers in Lower Michigan, outside of these arbitrary areas like around Detroit?

38798 The Witness: I think we have, Your Honor; whether we will produce them is entirely up to Counsel.

By Mr. Wooden:

Q. Do you claim, Mr. Lucas, that you are selling on an f. o. b. mill price when you figure a price that is the equivalent of some base price plus freight?

A. No.

Q. What f. o. b. mill price have you had at Lamson, your mill point?

38799 A. We have had f. o. b. mill prices there since 1922, and our present f. o. b. mill price is $2.15. There is no relationship to any so-called base or basing point.

By Mr. Wooden:

Q. Is your price at Petoskey the equivalent of some base point price plus freight?

A. Yes.

Q. What base?

A. Alpena.

Q. Alpena?

A. Yes.
Q. What is your price at Alpena?
A. The last—
Q. No, I mean Petoskey.
A. At Petoskey?
Q. Yes.
A. If I am not mistaken, it is $2.24.
Q. What is your price at Lamson?
A. $2.15. That is gross in cloth.
Q. What is the switching limits from your mill to the town of Petoskey?
38800 A. We are outside the switching limit.
Q. What is the rate there?
A. It is the minimum line haul.
Q. What is that?
A. Twenty-nine cents.
Q. Have you permitted anyone to whom you will sell at any point to take delivery at your mill and take it wherever they like?
A. No, I don't think we would go that far. We would not permit dealers to take cement promiscously into some other dealer's territory. We would have the same objection to that as we would to diversion.
Q. And yet you have sold f. o. b. mill, although you won't permit different people to take it where they like after getting it at th mill?
A. We have no control over it in most instances.
Q. Yet you say you have exercised such control?
A. No, I don't think we do, but I think we would—
Q. Well, you have, have you not?
A. Not to my knowledge. We have never had to exercise any such jurisdiction.
Q. In other words, it was not important?
A. Well, we have a very limited amount of it there, because the consumption in that immediate area is small.
38801 Q. Do you think that that would be selling f. o. b. mill if you would not permit the people to take the cement wherever they desired?
A. I do not think that enters into the f. o. b. mill. I think if a dealer violated other dealers' territories, in general, and became objectionable, and lost his business, we would not necessarily decline him the f. o. b. mill price. We would just decline to sell him at all.

By Mr. Wooden:

Q. Have you not refused to sell the Federal Government f. o. b. mill?

A. No. We sold them on that basis no later than ten days ago.

Q. Prior to the issuance of the complaint in this case, did you not frequently refuse to quote, except on the delivered basis?

38802 A. No, I don't think we refused.

Q. You just did not quote?

A. Very true, by virtue of the fact that we found from experience that people want destination prices.

Q. But where you found by experience that the Federal Government wanted an f. o. b. mill price, you still figured that they really wanted a delivered price; is that what you mean?

The Witness: No; I think the first intimation that the Government was serious about this f. o. b. mill price was the so-called Good Friday bid.

By Mr. Wooden:

Q. You did not think they were serious about it?

A. No.

Q. Why did you not think they were serious?

A. I have no recollection of their asking for it

38803 prior to that.

Q. Why did you not think the Government was serious when they asked for an f. o. b. mill price?

A. I have no memory of being asked about it.

Q. You said you did not think they were serious. I want to know why you did not think they were serious.

A. I have no recollection of being asked.

Q. Why did you volunteer that statement that you did not think they were serious, when you had no recollection about their asking for it?

A. If we received a bid, a routine bid, very little attention was paid to it on that basis, and our assumption is that they were not interested. If we had inquiries for f. o. b. mill prices, we would have assumed that they were interested primarily in destination prices; and probably would not have paid any attention to bids on that basis.

Q. In other words, you would assume the very opposite of what was asked for; is that right?

38804 A. I don't know that we were ever asked for f. o. b. mill prices.

Q. Were you not asked for one in the case of the job at Rolling Fork, Miss.?

A. Not to my knowledge.

Q. In other words, you do not know just what was asked for? And you did not handle it, in other words; is that it?

A. I have no recollection of that bid coming to us at all—any such invitation coming to us at all.

Q. You were asked by Mr. Withrow about the reasons for your not bidding on Government business for delivery into Ohio and West Virginia. That was Commission's Exhibit 1394, where such bids were asked for. Was not that an invitation to bid f. o. b. mill?

A. I am not sure. I don't remember ever seeing that invitation.

Q. What difference does it make to you where
38805 the government might want tho use the cement, if all they asked of you was a bid f. o. b. your mill?

A. Well, we are interested in more than where they want to use it.

Q. What difference does it make to you where they want to use it, if all they want is a price at your mill?

A. We are not only interested in where they want to use it, but what they want to use it for.

Q. In other words, you would sell it to them if they wanted to use it for some purpose, and you would not sell it to them if they wanted to use it for another purpose?

A. No; but we have this in mind: Our dealers are the backbone of our business. There are certain classes of business that we consider logical to sell through the dealer distribution channels, and we would not care to sell that class of business direct to the Government.

Q. Well, these invitations, such as Commission's Exhibit 1394, did not conflict with your policy in that respect; did they?

A. Are you referring now to the so-called Good Friday bid?

Q. Yes.

A. No, there was no restriction placed on that.

Q. In other words, the only thing, then, is as to whether the Government was going to use. What difference does that make to you?

38806 A. We bid f. o. b. mill on that.

Q. The first time?

A. The only time that I know anything about.

Q. And then later you declined to bid f. o. b. mill?

A. No; that was the only time I know anything about a bid coming up.

Q. Was there not a subsequent invitation?

A. Not to my knowledge.

Q. Something was said on your direct examination about a second time you did not bid, subsequent to the Good Friday bid, after bidding on the Good Friday.

Mr. Withrow: I think we are wasting a lot of time. Perhaps I can straighten it out. The witness testified that he had no recollection of an invitation, Exhibit 1934. The examination was entirely as to whether he did business in the territory covered by that invitation. He had no recollection of that invitation whatsoever.

Mr. Wooden: Well, I take it the witness is competent to state the reasons why they would not have varied their policy in regard to these invitations.

Mr. Withrow: He did not state his reasons for not bidding on the invitation.

Trial Examiner Norwood: Read the pending question. (Question read.)

Trial Examiner Norwood: Can you answer that?

38807 The Witness: I take it that that is merely a statement of Counsel's. He said "something was said."

By Mr. Wooden:

Q. Well, did you not say something on your direct examination about not bidding after the Good Friday bids, although you did on the Good Friday invitation?

A. I have no recollection of making any statement like that. I have no recollection of it.

38808 Q. Is it your testimony, Mr. Lucas, that you did not bid on an invitation from the Procurement Division of the Federal Government shortly after you did bid on the Good Friday invitation, represented by Commission's Exhibit 1394?

A. No; I don't think that was my testimony.

Q. Pardon me?

A. I don't think that is my testimony.

Q. Is it your testimony that you did decline to bid or did fail to bid on the invitation of the Procurement Division, subsequent to the Good Friday invitation?

A. I don't think that is my testimony.

Q. You don't think it is?

A. No.

Q. Is it your testimony that you did bid on a Procurement Division invitation subsequent to the Good Friday invitation?

A. We had on some Procurement Division—I say Procurement Division; I would not be sure of the particular division of the Government, but as I told you, we sold the Government not further back than 10 days ago.

Q. That is on the lighthouse?

A. No; no, I think that is in connection with the 38809 C.C.C. camp, or something like that.

Q. As a matter of fact, I am not concerned with the question of whether you sell the Government. I know you do, for some purposes, and all companies do for certain purposes.

Mr. Brick: Is that a question?

Mr. Wooden: No; I am leading up to it.

Mr. Withrow: It is a misstatement of fact so far, and I object to it on that ground.

Trial Examiner Norwood: Finish your question.

By Mr. Wooden:

Q. Let me ask you this question: Do you have a policy to sell the Government f. o. b. your mill when requested?

A. Yes; generally speaking, we have.

Q. Why did you not quote your f. o. b. mill after the Good Friday invitation, on which you bid?

A. Because I have no recollection of receiving the invitation. Are you asking, Mr. Wooden, about the re-invitation on the basis of the Good Friday bid?

Q. A re-invitation?

A. Yes; on the same basis as this.

Q. Not a re-invitation, but a new invitation, shortly afterwards?

A. Predicated on zones and all that sort of thing, the same way as this was?

Q. Well, it was a small one, asking for 5,000 38810 barrels—bids on 5,000 barrels.

A. I have no recollection of having received any such invitation.

Q. And, now, with reference to this meeting that you attended, where you say you were invited in and Mr.

Johnson made his statement about the policies of his company, was that in Chicago?

A. I am not certain, but I think it was.

Q. That was in December, 1935, was it not?

A. As I recall, along about that time.

Q. You say you were surprised at being invited in?

A. I was not so surprised at the invitation to come in as I was at the statement that Mr. Johnson read.

Q. Were you invited to Chicago to attend the meeting?

A. No.

Q. How did you happen to be in Chicago?

A. I don't know as to whether that was at the time of some other meeting of the Portland Cement Association or not. However, I am frequently in Chicago.

Q. The Portland Cement Association does have meetings in Chicago in December, usually, does it not?

A. Very frequently; yes, sir.

Q. Early in December?

A. November and December.

Q. Can you fix the time when you rejoined the 38811 Portland Cement Association after being out?

A. No, I could not, without something to refresh my memory.

Q. Could you say whether it was about July, 1932?

A. No; I think it was later than that.

Q. You have not anything definite to fix it by?

A. No; not in my mind; no.

Q. Was that handled by Mr. J. B. John?

A. No; it was handled by Mr. J. A. Galster.

Q. Was Mr. John at that time president of your company?

A. Yes, he was. However, Mr. Galster was—

Q. Now, regarding this Graham traffic service that you said you used for some time, during what period was that used?

A. From along in 1923 or 1924 until about 1930, as I recall it.

Q. And you said that some other Michigan companies also used it?

A. Yes.

Q. What other companies?

A. I think what was then the Peninsula, and I believe the Wolverine, I think the Newaygo, and possibly the old Peerless over at Union City. That is my recollection of them.

Q. Any others—the Aetna or Huron?

A. I am quite sure that the Aetna or Huron, neither one did, but I am not sure but what maybe the New Egyptian. I think maybe they were in existence then.

38812 Q. Was that service similar to the freight rate service of The Cement Institute?

A. Very similar.

Q. Do you use them in the same way?

A. Yes.

Q. For the same purpose?

A. Just exactly.

Q. From what point did the Graham Service show the rates?

A. I can't tell you that. I don't remember. That was some ten years ago.

Q. They did not show the rates from your mill, did it?

A. I think not.

Q. As I understand it, when you first joined the Institute, the Institute books did not show the rates from your mill.

A. I think not.

Q. You said eventually your mill was made a headline point in the freight books. How long after you joined did it become a headline point?

A. I can't answer that definitely; just how long ago it was.

Q. Can you give some idea as to how long it was? I don't expect you to be exact.

A. Well, I think it was probably three or four years or more.

Q. And you joined the Institute in 1930?

A. Yes, as I remember it.

Q. Well, it was that entire period of time, was
38813 it not, that you could not use the Institute books for any traffic purposes, when they did not show rates from your mill?

A. You mean when they did not show our headline point?

Q. Yes.

A. That is true; we could not use it for our own rates.

Q. You said sometimes you used the railroad tariff rates for the bills of lading, and sometimes you used the Institute freight rate.

A. Yes.

Q. What is the occasion for determining which one to use?

A. That is handled in the order department. I would say that normally they would use the Institute freight rate book. If there was some question about our rates, or if our rate looked unreasonable, or for some reason, they would undoubtedly check it with the railroad tariffs.

Q. You would have no idea as to what the proportion of cases is in which they used the railroad tariff and in what proportion they used the Institute freight rate book?

A. From my observation of the workings in the department, I would say that the Institute rate book was used predominantly.

Q. These rates from other mills to destination have no value to you for shipping purposes from your mill; do they?

A. No, not for shipping purposes.

Q. The rates from other mills are of value to enable you to quote delivered prices; are they not?

38814 A. Well, the rates from the other mills enable us to, once we pick up delivered prices, to determine if there is some general pattern that mill is offering, or some general mill method that it is offering all over that territory. That is true; we get their rates.

Q. Well, after you get the common mill net you find is being used, then you use the freight rate book to apply it to figure out the destination prices at other destinations?

A. At some destinations. At many destinations we have the prices picked out there.

Q. Now, with regard to diversions, diversion is ordinarily not made, is it, except from a low-priced territory into a higher priced territory?

A. That would seem to be the logical reason for diversions, but we would be just as opposed to it the other way around.

Q. You would get the same mill net out of a sale made regardless of whether it was diverted or not, wouldn't you?

A. Under ordinary circumstances, yes.

Q. Why wouldn't you always? You make the sale, your mill net is fixed, and it does not matter, that cannot be changed whether the car is diverted or not, can it?

A. Unless there were some cases where a higher rate from our plant was to revert back to us some way or the other, then we would not.

Q. I do not understand.

38815 A. Well, all right. Let us assume we ship a car out tomorrow for point A, with a rate of 50 cents per barrel, that we divert that car to point B, with a rate of 55 cents, we do not get the same mill net.

Q. Well, if you diverted it.

A. Yes.

Q. But if the customer diverts it.

A. Very true.

Q. What is very true?

A. I say in those instances, if you were to expect us to absorb a higher freight, we would not get the same net. If we paid the absorption, we would get the same net.

Q. But if a customer makes a purchase at a given delivered price, your mill net on that sale is fixed and it does not matter, does it, and your mill net cannot be changed by his diverting it to some other point?

A. No, if he settles on the basis of the original consignment.

Q. Is that the way he always settles?

A. Customarily, yes. We have very little trouble with diversions.

Q. Diversions tend to interfere, do they not, with your ability to get the delivered price at the point to which the diversion is made, doesn't it?

A. No. Diversions interfere with our maintain-

38816 ing satisfied customers.

Q. I grant you that is a fact, but isn't it also a fact that if the diversion is made into a town that carries a higher delivered price, that that may interfere with your ability to get that higher delivered price at that time?

A. Oh, if that, it would, yes.

Q. That is why you do not permit it, too?

A. No, that is not why.

Q. That never occurred to you?

A. I did not say it did not occur, but that is not our reason for not permitting diversion.

Q. It is not any reason at all?

A. No.

Q. It doesn't enter into the picture at all?

A. (No response.)

Q. Do you mean to say it has nothing to do with the matter?

Mr. Brick: May the question be read?

Trial Examiner Norwood: Let him answer the question.

Mr. Withrow: May the question be read to him,—three or four questions back? I think it relates to that.

(Record read.)

Trial Examiner Norwood: Answer that last question.

The Witness: I do not know as I understand it
38817 as it is now.

Will you read that question again?

Mr. Wooden: I will make it plainer, if I can.

The Witness: All right, please.

Trial Examiner Norwood: Make it plain enough.

By Mr. Wooden:

Q. Do you mean to say that the effect of diversion upon your ability to maintain your delivered prices in the towns to which diversion is made has not a thing to do with your opposition to diversions?

A. We never have been forced to consider that situation at all, because we have been opposed to diversions.

Q. Well, will you answer my question?

A. Yes, that has.

Q. You say that has not a thing to do?

A. We have never had that consideration up.

Q. Have you discussed diversion with competitors?

A. No.

Q. Did you ever learn that it was considered a problem in the industry?

A. It may be in certain sections. It has not been a problem with us.

Q. Did you ever learn it was a problem?

A. No.

Q. Did you ever learn your competitors con-
38818 sidered it a problem from the standpoint I have just suggested to you?

A. No.

Q. Do you have in your forms, contract forms, a provision that diversion will not be permitted?

A. I think our forms do provide that we can control the destination to where the shipments are made.

By Mr. Wooden:

Q. Were you aware that under the Code to which you were a party, the N. R. A. Code, that diversions were forbidden where they had the effect of reducing the regular destination prices?

A. No, I do not remember any such condition as that in the Code.

38819 Q. Do you recall that the Compendium put out by the Institute after the Code had any similar declaration against diversions?

A. No.

Q. Do you recall that the Code of Ethics of The Cement Institute, adopted in 1930, had any similar declaration against diversions for that reasons?

A. No.

Q. Now, with regard to your policy in making or permitting delivery by trucks, I understood you to tell the Examiner this morning when he asked you the question, that when you made or permitted delivery by truck that the price was the delivered price at the purchaser's destination calculated on the rail basis; is that correct?

A. Well, if I said that, I should modify it, because that is not necessarily true.

Q. Well, now, let us find out to what extent it is true. Tell us to what extent it is true.

A. Well, of course, it never was true when we had the zone prices because they had no relationship to rail rates. There are those destinations I cited you in the northern part of the State up there, the old logging rates, and such have been abandoned, where there is now no rail service. That has no relationship.

38820 Q. They could not apply there, of course.

A. And there are occasional zones around cities where delivery into certain towns, where it does not bear any relationship to the rail rates.

Q. Like in Detroit?

A. Yes.

Q. And Wayne County?

A. Yes, and in the Thumb district, not only up—what we call the Thumb district, out of Detroit, but up here toward Port Huron, there are a number of destinations used to be on little electric lines, that no longer exist, haven't any rail service.

Q. Just like those abandoned lines in the other part of the State?

A. Yes.

Q. That is all right.

It goes without saying where you do not have any railroad service you cannot have any rail rate.

A. Yes.

Q. And therefore you cannot figure it that way.

Mr. Brick: Is that a question?

Mr. Wooden: I am just giving him a chance to agree with me, that is all.

By Mr. Wooden:

Q. With the exceptions that you have just named, 38821 then is it true that your prices for delivery to or by trucks are the equivalent of the destination prices figured by rail?

A. They are the equivalent of the destination price that we found there, and in many instances they work themselves back to a railroad themselves, to some rail rate at some base; that is true.

Q. In other words, the equivalent of base price plus rail freight.

A. In many instances, yes.

Q. With the exception of the cases that you just finished describing, is that the situation?

A. Quite largely, yes. Those are the only exceptions I think of at the time, but they are quite predominant. You would be surprised how many there are.

Q. In the territories that you have just referred to as to where there are no rail lines, no rail services, how do you figure the prices delivered by truck?

A. We meet the destination prices we find there.

Q. Do you mean to say that you have your salesmen traveling into those points all the time?

A. Yes.

Q. And do such prices as such points have any relation at all to any base prices?

A. Apparently not. We cannot relate them because we have no rate to work with.

38822 By Mr. Wooden:

Q. Has your company made it a policy or practice to at all times allow dealers to send trucks to your mill and buy at a mill price without regard to where they wanted to take the cement?

A. Yes. We haven't any trouble.

Q. Have you in such cases made your price with reference to the delivery point where they did intend to take the cement?

A. No.

Q. In other words, you make the same price to a dealer sending trucks to your mill regardless of where the dealer was going to take it?

A. Yes. We have out of Petoskey a resort area of Lakes, and one thing and another there. Well, those territories tributary to maybe two or three of those places, we do not attempt in any way to dictate where they want to take it. They can all come to the mill and get it, and some goes to one place and some the other.

Q. In such cases could you charge them the Petoskey delivered price?

A. No.

Q. What?

38823 A. We charge them the f. o. b. mill price.

Q. What is the difference between the two after making allowances?

A. At the present time; it is 9 cents a barrel lower on the f. o. b. mill.

Q. Your f. o. b. mill there, that you refer to, was higher than many of your mill nets, wasn't it?

A. Yes.

Q. Higher than the mill net as you went away from the mill?

A. Yes.

Q. On rail shipments?

A. That is what we like to get for all of our products.

Q. When you put on this 15 cents' additional charge for deliveries made to trucks at the mill, did that affect the volume of the trucking done in small lots?

A. Not substantially, no.

Q. You did want to discourage it, didn't you?

A. No. We wanted to compensate us for the extra expense we were being put to in connection with the loading of the trucks, and we were perfectly willing that the real small lots, such as a bag or two, be taken, but if they wanted to pick it up in larger quantities, why, we much preferred that.

Q. Is it your testimony that your policy with regard to trucking or the use of the 15-cent differential for truck orders had nothing to do with your desire or with
38824 any desire to have delivered prices remain stable?

A. I do not think it was ever considered in connection with the delivered price.

Q. Did you ever know or learn in any way that the

industry considered that a problem, the effect of trucking upon delivered prices?

38825 A. No, not in that way; I have known that the industry in certain sections was opposed to trucking; people in the industry that were opposed to trucking.

By Mr. Wooden:

Q. For that reason?

A. No, but we have had trucking in Michigan as 38826 long as we have been in business.

Q. Didn't you participate in meetings at which the effect of trucking by the Aetna Company, and others, upon delivered prices was discussed?

A. No.

Q. Weren't you at meetings in which it was decided that trucking would be discontinued in certain areas?

A. No.

Q. Wasn't the trucking situation discussed at some of these—or one or more of these meetings at which you attended af which Mr. Johnson was present?

A. No, I never recall discussing trucking at a time when Mr. Johnson was present. I remember a time of discussing trucking just prior to the Code, and how trucking would be—how it would be filed, and so on,—provisions for it.

Q. You put in evidence here an exhibit showing you were discontinuing trucking in the Upper Peninsula of Michigan in November, 1935.

A. Yes. I think I can explain that.

Q. Well, I am just referring to it. I want to ask you a question: Don't you know that that was the very time at which your competitors discontinued trucking up there?

A. I know that was about the time, yes. Do you mean about the time that we withdrew our filing?

Q. Yes.

38827 A. Yes.

Q. Were you aware of a meeting in Detroit at which the discontinuance of trucking in the Upper Peninsula of Michigan was discussed?

A. No.

By Mr. Wooden:

Q. Now, with regard to your mill net, you defined what you meant by mill net. Isn't it your mill net compared

with your cost per barrel that determines whether you will make or lose money on the sale?

A. Yes. I think that is probably true.

Q. And yet you say that the mill net is not your price?

A. No, it is not.

Q. Do you know of any other way to figure whether you make or lose money than by comparing your price with your cost?

38828 A. Why, I do not think that you can take any individual order and figure whether you are going to make a profit or loss on it, even if you know the price, and know your then average cost.

By Mr. Wooden:

Q. Well, do you know in any way in which you can determine whether you are making or losing money except by comparing your average mill net with your average cost?

A. I am not an accountant, but I assume after you get all through that the difference you have left, of course, is your profit, if there is one there.

Q. You make up figures, do you not, showing your total net sales?

A. Yes.

Q. And that is the total of your mill nets?

A. In the auditing department, they carry certain—

Q. And you divide that by the number of barrels to get your average mill net?

38829 A. That is right.

Q. Do you ever make up any figures showing what the total of your delivered prices was?

A. The total of our delivered prices?

Q. Yes.

A. The average of our delivered prices?

Q. No, what your total of all your delivered prices is.

Mr. Withrow: Do you mean gross sales?

By Mr. Wooden:

Q. The gross of your delivered prices.

A. Well, I am afraid you are getting a little over my head. I think that is something you will have to ask the auditors about. I do not know whether they carry such figures or not. I presume that they do carry figures showing gross sales which would probably be the equivalent of the total of our prices on cement sold.

Q. Well, what do you mean by gross sales? Do you mean the gross of your delivered prices?

A. Yes.

Q. Have you ever had such figures, come to your attention, what they were for the year, what your gross delivered prices for the year were?

A. No, not as such, as I recall.

Q. It would not be a matter of interest to you, would it?

A. It might be, yes; I would like to know now 38830 so I could answer you.

Q. But you do not know at any time even approximately what the gross of your delivered prices is in any year, do you?

A. Why, no. I do not think I could tell you.

Q. But you are very much concerned with what the gross or the total amount of your net sales is?

A. I could not tell you that, either.

Q. But you are very much interested in that, aren't you?

A. Well, yes, I am interested in that, and interested in the final profits and loss statement; also interested in our costs.

Q. When you filed prices with the Trade Practice Committee following the invalidation of the N. R. A., didn't you understand if you wanted to make a change in your prices that you should file new prices?

A. Well, we understood that the whole thing was entirely voluntary—

Q. Well, answer my question.

A. What is that?

Q. The answer to my question is what?

Mr. Withrow: He is starting the answer. Let him complete the answer.

Trial Examiner Norwood: Read the answer.

(Answer read.)

Trial Examiner Norwood: Complete your answer.

A. And we had no obligation to make a new 38831 filing if we wanted to change them.

By Mr. Wooden:

Q. Did you understand that under the N. R. A. Code that you were obligated to adhere to the filed prices until you made a new filing?

A. Yes.

Q. Did, any time during the Trade Practice Committee

regime, did you change your prices without making announcement or making new filings?

A. I do not think so, but that covered a very short period. I would not want to say definitely.

Q. Now, I understood you to say that your mill was not a base mill because buyers were interested in delivered prices. Did I get you correctly on that?

A. Well, yes. We are primarily—we meet such competition as we find in the field.

Q. Well, did I understand you correctly, that the reason you were not a base mill was because buyers were interested in delivered prices?

A. I do not know as I said that, Mr. Wooden.

Q. Well, is that a reason, one reason why you are not a base mill?

A. No, I do not think so.

Q. You do not see any relationship between being a base mill or a non-base mill and the interest of buyers in
38833 having or getting delivered prices?

A. No, I do not think it has any bearing on it.

By Mr. Wooden:

Q. As a matter of fact, you could make delivered prices to buyers whether you were a base mill or a non-base mill?

A. Oh, yes.

Q. And you could make delivered prices to buyers whether there was a basing-point system or not, couldn't you?

A. Yes. We have done it. We have done it with zone prices.

Q. Do any of your competitors sell in Petoskey?

A. No.

Q. You have all the business in Petoskey?

A. Yes, such as it is.

Q. Have you ordinarily found that the prices of various competitors are the same at given desinations as your own?

A. No; we attempt to make ours the equivalent of the lowest one there, if we want to get any business.

Q. Can you name specific instances where you made different destination prices than your competitors?

A. Yes; I think there was one introduced in the record here this morning, in Milwaukee, where our prices were not comparable to the lowest prices.

38833 Q. Well, ordinarily, are not your delivered prices

at given destinations, competitive, as you call it, with those of your competitors?

A. Ordinarily in marketing in this business we find it necessary to meet the lowest price quoted, in Milwaukee, if we want to stay in there. If we do not, we just do not quote there any more.

Q. And the same thing goes as to the others; if they want to be competitive, they have to be as low as you?

A. They have to be as low as the lowest one there.

Q. Can you cite any particular instance where the Petoskey Company and thee Medusa Company made different delivered prices at the same destination?

A. Petoskey Company and the Medusa Company made different prices? Well, this Milwaukee one is a good example, where we were not as low as they were.

Q. Was Medusa involved particularly in that case?

A. I take it they are in that market there.

Q. They were not mentioned?

A. No, no; this is our own quotation, but I—

Q. Did that represent a change in prices?

A. Yes.

Q. Well, frequently, of course—you are a price follower, as I understand it?

A. Correct.

38834 Q. You frequently find that when a price changes you are not low, and you then proceed to make yourselves low; is that it?

A. That is right.

Q. As low as the others?

A. Yes.

Q. I notice in paragraph 30 of your stipulated testimony, it was stated that it was the practice of contractors to shop around to make sure that they obtain the lowest prices that are quoted. Dealers frequently just merely send in the order for whatever price happens to be going, without any further check on the matter?

A. For ordinary carload shipments, yes. They order on the basis of their last regular quotation from us.

Q. With reference to your practice of guaranteeing against decline, in making good on the decline for a period of five days before the decline, how long have you followed that practice?

A. Well, within reasonable limits, ever since we
38835 have been in business.

Q. The five-day period?

A. The five-day period, I think, was more or less a matter that was fixed during the Code days. Prior to that, if I am not mistaken, we used to have three days.

Q. How many instances of a price change do you think are necessary before you decide that a price change has taken place; I mean, how many instances picked up in the field?

A. Well, I would say that would vary under different conditions. I do not think you could say that a certain given number of instances would always hold good.

Q. Well, give us some idea of the range?

A. It makes a lot of difference. If you were only interested in a limited territory, you could pick it up quickly and be satisfied with a half a dozen. In other cases you might not be satisfied with less than at least fifty or more evidences of it, depending upon the size of the territory, and so forth.

Q. How many destinations are there in which your company is interested—several thousand?

A. Oh, yes, I presume that is true, in all the territory, but a change in price is usually not brought about by a single quotation in all the territory that we sell in.

Q. You probably have hundreds of destinations that you are interested in, in which you sell, and in which you do business?

A. Yes; interested in—not that we sell, but are 38836 interested in.

Q. At least you solicit?

A. Yes.

Q. Now, referring to your stipulated testimony in paragraph 39, where you said that during the time you have been with the company there had been a flat price at all of the points in the southern area, such as the Lower Peninsula or the three counties around Detroit, can you fix the times when that was the condition?

A. No, not from memory.

Q. Can you fix any time other than 1936 or 1937 for the flat prices throughout the whole Lower Peninsula?

A. No.

Q. You mean by that that those are the only times you can think of where that was the condition?

A. Well, I am taking your word for it, that that was the date. I am not sure of it.

Q. Well, that one period there? Are there any other prior periods where that same thing occurred?

A. No; I have no recollection of it.

Q. And the flat price in the three counties around Detroit, how long had that been in existence, to your knowledge?

A. Well, that varied. That was longer than the flat price in the entire lower Peninsula. I don't know just how long that was.

38837 *Redirect Examination by Mr. Withrow:*

Q. Do you recall any time where you refused to make a sale to the United States Government just because it requested an f. o. b. mill price?

A. No.

Q. Can you tell us whether or not you received any request for f. o. b. mill prices by the United States Government, say, from the National Park Service, prior to July, 1937?

A. I am quite sure that we did.

Q. On these lighthouse jobs you talk about, were some of those before July, 1937?

A. Oh, yes.

Q. Those were f. o. b. plant?

38838 A. Yes, they were f. o. b.—

Q. Docks?

A. Docks or Government light ships.

Q. Now, on the question of the sales of 1936, will you tell us whether a substantial portion of the cement you sold in Chicago was sold at a mill price for truck delivery?

A. Yes; it was.

Q. And how about Milwaukee? Was it substantial there for truck delivery?

A. Probably not as much in proportion.

Q. How about Detroit; how would Detroit compare?

A. Probably about like Milwaukee.

38839 Q. Did you make any use of or did your agree to abide by the provisions of the Compendium that Mr. Wooden referred to?

A. No.

Q. Now, with reference to that exhibit on trucking in the Upper Peninsula had you shipped a great amount of

cement by truck in the Upper Peninsula prior to November 16, 1935?

A. I don't think we had shipped any in there. The Aetna Company were trucking there, and I think we filed a trucking provision with the Code to protect ourselves in the event that some large contract came up. If we wanted to follow it, it might become preventive by trucking from car to job, but I don't think we ever trucked any, and we withdrew it at this interval.

Q. Was that withdrawal made as the result of any agreement with competitors?

A. No.

Q. As the result of any meeting with competitors?

A. No. This was during the Code provision filings. When others withdrew, we were happy to do the same thing.

38840 Q. Is it according to any agreement to the effect that Petoskey should not be a base mill?

A. No.

Q. Is it according to any agreement that any mill should be a base mill or should not be a base mill?

A. No.

Q. Have you any agreement of any kind that Lamson should not be a base mill?

A. No.

Recross Examination.

By Mr. Wooden:

Q. Mr. Lucas, are not your silo prices at these various silos the equivalent of delivered prices at those points, and possibly a premium of 5 cents, or something like that added?

A. Yes.

38844 Washington, D. C.,
Tuesday, May 21, 1940.

38847 Mr. Wooden: Your Honor, referring to the motion made by Mr. Leisure on May 16, at page 38667 of the record with regard to the striking of certain of Commission's exhibits relating to T.V.A., I wish at this time, without regard to whether that motion is accurately and completely recorded by the Reporter on the record, to move to strike an additional portion of the record as being within the terms of my general offer to strike anything relating to this particular subject of cost and fairness of price on T.V.A.

This exhibit that I now refer to was one that was widely separated in the record from the others, and for
38848 that reason was overlooked.

I am now referring and moving to strike or withdraw Commission's Exhibit 562-12-Z, beginning with the words, "Dr. Morgan opened the discussion by presenting a statement," etcetera, and continuing and including all of 13-A, all of 13-B, and a portion of 13-G, down to the last paragraph, excluding the last paragraph of 13-C.

The motion includes part of 13-D, beginning with "Mr. Smith further stated that present market prices were not too high," etcetera; all of 13-E. On 13-F, the motion to strike includes the second paragraph only.

On 13-G, the motion to strike includes the third paragraph only.

The motion also includes Commission's Exhibit 562-13-K, L, M, N, O, P, Q, R, S, and T; in other words, the 13 series running from K to T, inclusive.

I have some reason to believe that the record of the exhibits coming within the terms of Mr. Leisure's motion is not accurate. For instance, it refers to Exhibit 362, several subletters under 362, and there is no such exhibit in the record.

So, before making any response to any of the others, I prefer to have the record checked and made sure that it is accurately stated; but I want to make this motion which
I have made regardless of whether or not it comes
38849 within the exact terminology of Mr. Leisure's motion.

Mr. Brick: If Your Honor please, we will check the

record with regard to the exhibit numbers included in Mr. Leisure's motion, and in addition to that I would like to request Your Honor to postpone a ruling on that motion for two or three days, and in the meantime I think that we will be in a position to make it complete to the extent of including all of the exhibits which we believe should be stricken on the basis of rulings which Your Honor has laid down.

I might add in connection with Mr. Wooden's motion to strike his own exhibits, that a number of those exhibits do relate to cost, and while I appreciate Your Honor has ruled that subject out of the case, nevertheless in many cases the contents of the exhibits, even though the subject has a direct relation to cost, are necessary for the purpose of disclosing the reasons why the companies cooperated with one another and with Dr. Morgan and the T.V.A. officials.

So that I think that prior to the time that this matter is brought to a head by complete motions, we all might give consideration to the thought that as to some exhibits they might be improper for one purpose in so far as Your Honor's rulings are concerned, but proper for other purposes, so that the ultimate result might be that 38850 they should go on the record, but the purpose for which they remain on the record should be limited.

Trial Examiner Norwood: I think so. I stated some time ago, and some of the Counsel seemed to agree, that costs as such were not in issue, but there will be no prejudice even if these exhibits were left in, because they will not be considered on the matter of cost. I think to all intents and purposes they are so admitted at this time.

Mr. Wooden: I think the record would show, independent of any such matters Your Honor refers to, that the industry did cooperate in a study of costs in connection with T. V. A., and I think the record probably, even with all these exhibits out, will still show that, and for the purpose Mr. Brick has in mind I think the record is ample.

Trial Examiner Norwood: Yes.

Mr. Brick: Well, I am not urging any particular point now. I am merely suggesting that the Examiner and Counsel for the Commission and our group consider the exhibits from each of those angles, because, after all, Mr. Wooden has always restricted his position so that he has not withdrawn anything which he believes bears on the

matter of collusion, and, of course, so far we have not been able to find out on what documents he relies in
38851 support of his claim that there was collusion.

Trial Examiner Norwood: Well, I will, as Counsel suggests, reserve my ruling on that motion and give the Counsel time to amend it or to enlarge it, just as he sees fit, and in the meantime I reserve the ruling on Mr. Wooden's motion that 562, and the documents he named there, be stricken.

38854 WILLIAM R. BLAIR was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

38856 *Direct Examination by Mr. Withrow.*

Q. Mr. Blair, I show you Respondents' Exhibit 2954-A and B, and ask you if that was received by the Southwestern Company?

A. It was.

Q. And did you receive it in the regular course of business?

A. Yes, sir.

Q. And how long have inquiries such as this been
38857 received by your company?

A. Ever since I have been with the company.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 2954-A and B.

Mr. Wooden: It is objected to as immaterial.

Trial Examiner Norwood: What is this to show, Mr. Withrow?

Mr. Withrow: It is to show a specific form used by one of the customers of the Southwestern Company, specifically stating that they do not want prices quoted to them, f. o. b. the mill, and if the Southwestern Company insists on quoting f. o. b. the mill, whatever information Southwestern must furnish.

Trial Examiner Norwood: The objection is sustained.

38866 By Mr. Withrow:

Q. Mr. Blair, have you ever received from competitors lists of so-called mill bases or mill base prices?

A. I have not.

38874 By Mr. Withrow:

Q. Now, to your knowledge, Mr. Blair, was this re-sale price of 85 cents observed by the dealers for any period of time?

Mr. Wooden: That is objected to as still more irrelevant and immaterial and very remote even from the remote subject that we are now going over.

Trial Examiner Norwood: I do not see why we are bringing in this thing here to try to prove your clients tried to fix re-sale prices.

Mr. Withrow: Your Honor, if Mr. Wooden is willing to concede that there is no issue of re-sale price maintenance in this case, and that Counsel for the Commission will not argue before the Examiner, before the Commission, or before the courts, or attempt to draw any inference from any testimony with reference to re-sale prices, I will desist from this entire line, but unless that concession is made I will have to go into it, because they have gone in it, and gone into it with respect to this company.

Trial Examiner Norwood: What about that?

Mr. Wooden: Your Honor, I do not believe that
38875 the case contains any issue regarding the method of fixing re-sale prices, as such. If there is any isolated material in along that subject, it is because of the relationship it bears to the cooperation between Respondents' customers as a class, dealers' trade, just like the proposition of what classes of trade are proper trade for the dealer and what clases of trade are proper for the manufacturers. It goes to the question of cooperation, and not what the prices are, or what the re-sale prices are, or dealers' margin, or anything of that sort.

38876 Trial Examiner Norwood: I think if the complaint does not raise the issue, it is not in here and we had better confine ourselves, then, to conspiracies or agreements about the matters alleged in the complaint. I think the entire line should be excluded. We are bringing up something here about re-sale price maintenance in order to disprove it.

38879 Mr. Brick: Judge, I wonder in that connection if I might mention that it was on the basis of the state of the record at the close of the Commission's case that we made our motions to strike. As we explained at that time it was an effort to trim down the great mass of material which the Government Counsel had offered, so

that we would be able to conduct as intelligent a defense as possible with respect to the issues, and of course our purpose was not achieved because nearly in their entirety the motions were denied not only by Your Honor but by the Commission. Almost everything which had been received during the course of the Commission's case was left in the record, and not only that but it was held to be binding against all of the Respondent companies.

Now, in the situation as if now stands, there isn't
3888 much difference from what it was at that time. We are confronted with a great mass of material, the relevancy of which in many cases is not apparent as far as the direct issues are concerned, and from time to time we have asked Mr. Wooden to make certain concessions which would make it unnecessary for us to pursue any further the line of inquiry on the papers which were in the record, but which we did not think were directly related to the issues. In nearly every case Mr. Wooden has refused to make concessions which would help us along that line, so we are in the position of selecting at our peril that part of the record which we think the Commission might act upon, and we do not think that is a very happy condition, as far as Respondents are concerned. After all, they have been charged with matters which we consider to be of a serious nature, and we feel that as far as the direct issues are concerned we can meet those by the material we can present through our defense. We are not at all adverse to the idea of Mr. Wooden at this time trimming down his record to whatever extent he considers it possible. To the extent that he should trim it down we would be saved the necessity of determining what material we will meet and be able to abide by Your Honor's suggestion, otherwise it is necessary for us to meet everything that is here.
3888 Now, we had an example of that this morning where Mr. Withrow put a request to Mr. Wooden to make a concession on matters on which Mr. Wooden had introduced evidence, and Mr. Wooden said that he did not offer that for any particular purpose, but it was only for the general idea of showing cooperative efforts among Respondent companies. Now, in even those cases it is necessary for us to show that the cooperative efforts were proper, and that there was not anything wrong about them, and that there was not anything in connection with those matters which would bring anything about in this case supporting the charges in the complaint.

The state of the record is such that it is difficult for us to respond to Your Honor's request as to ignoring matter which we do not think is material to the issues. We have either to represent our clients properly, and in that case produce whatever material we think offsets the inferences which Mr. Wodden is trying to develop, or else ignore that and follow Your Honor's suggestion of trying to exercise judgment as to what Your Honor or the Commission will determine to be material and relevant.

38889 Q. Did you ever threaten to refuse to sell to a dealer who failed to observe this re-sale price?

A. We did not.

Trial Examiner Norwood: You suggested the price to them; is that the idea?

The Witness: Yes.

By Mr. Withrow:

Q. Was that at their request?

A. At their request.

Q. And I would like to show you Commission's Exhibit 1275-E and F, and direct you to the last paragraph. Is that the situation that you have just been talking about (handing the document to the witness)?

A. Yes.

Q. Now, in that last paragraph you referred to having tried the same matter previously; that is, prior to May 16, 1935. Do you recall those efforts?

A. Only very remotely. I just remember that such an attempt was made, but the details of it I cannot state.

38892 The witness identified Resp. Ex. 2968 A to E as sheets from "our" combination rate and price and dealer quotation list. That is prepared in the El Paso office. The witness stated that one is for New Mexico, one for Texas and one for Arizona. The witness further testified that those sheets are prepared in his office. The rate information is prepared by "our" traffic manager, from the tariffs that he obtains from the railroads.

38893 On the face of these a number of pencil notations appear. They tend to be the same as the typewritten figures, that is, the same as the rates filled in and other information filled in, in that they cover the same point as those listed in the right hand column. They indicate changes that have been made in the rate as originally shown on the typewriter. Going down across the top the

statement "Rates from Kansas" means rates from the mills located in the Kansas Gas Belt.

38896 (RESP. EX. 2968-A to 2968-E was offered and received in evidence.)

38897 Q. Mr. Blair, I show you Respondents' Exhibit 2969-A, B, and C, and ask you to tell us what they are.

A. This is a conversion table we use in our office.

Q. And how long have those conversion tables been in use?

A. Ever since I have been with the company.

Q. And that specific conversion table—

A. Has been used for many years. I do not know how many years it has been used. It has been on my chief clerk's desk for a great many years.

Q. Say, before 1930? Does it go before 1930?

A. I would say so, from the way it is headed, "Without War Tax."

(RESP. EX. 2969-A, 2969-B, and 2969-C was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Blair, was this conversion table prepared

38898 in your office?

A. It was.

Trial Examiner Norwood: You use that in all your prices? Is that the one you use?

The Witness: Yes, sir.

Trial Examiner Norwood: Is that any different from the Institute conversion tables?

The Witness: I have never seen an Institute conversion table. This is for two different types of cement, and also a weight figure on carloading.

By Mr. Withrow:

Q. When did you become sales manager of the El Paso mill?

A. In March of 1927.

Q. And when you were appointed sales manager were you familiar with the Texas territory?

A. Just a very small portion, three counties in West Texas.

Q. Had you had any sales experience in Texas prior to becoming sales manager of the El Paso mill?

A. No; only those,—a few towns, probably three towns in those three counties of West Texas.

Q. Now, did you make any effort to become better known by the dealer and contractor trade in Texas following your appointment?

A. Certainly. I made numerous trips and visits to a number of points in Texas in order to become ac-
38899 quainted with that territory.

Q. And in what matters were you interested in becoming acquainted with at that time?

A. First, I wanted to become acquainted with the dealers and the contractors personally; second, I wanted to find how our competitors were operating in that territory, and to get the general picture of the territory as I had of the other territory, with which I was so much better familiar.

By Mr. Withrow:

Q. Now, in this connection, did you have any contact with dealer associations?

A. I attended every dealer association meeting that I could get to.

38900 Q. When did you first attend these conventions?

A. I think the first one was in April following my appointment as sales manager in March of 1927.

Q. And why did you attend these conventions?

A. At these conventions I could meet a great many of the dealers in a very short space of time. Our Texas territory is so large that I could not get over it in months and see the men that I could see in those meetings in one or two days. It was an economy of time as well as the money of the company.

Q. And have you continued to attend these dealer conventions for that reason?

A. I have.

Q. Do a great many of your customers attend these meetings?

A. Yes; several hundred.

Q. Now, would you just tell us what takes place at these dealer conventions that you have attended?

A. As far as I am concerned?

Q. As far as you are concerned.

A. Mostly visiting with these dealers, and in Texas a great many of them are accompanied by their wives, and it is a social contact with them in the hotel lobbys and in their rooms, visiting personally, and regarding their business in the home town.

Q. Now, have you ever taken part in these conventions in the actual discussions and deliberations,—at the
38901 dealer conventions?

A. None whatever.

Q. Now, have you found that these dealer associations have committees concerning cement and the marketing of cement?

A. Texas has a committee called a cement committee. I am not certain whether that is of the Texas Lumber Dealers' Association or the Texas Line Yard Dealers' Association.

Q. Well, in some of the documents which you wrote there is a reference to a cement committee. Is that the committee you refer to?

A. That is the committee; but, as I say, I am not certain just which association that belongs to.

Q. Now, have you ever taken an active part in the deliberations and decisions of this cement committee?

A. No, sir.

38902 Q. Have any of these dealers requested a revision of your practices of marketing cement?

A. I think at one time they did.

38903 What was that request, if you recall?

A. Well, at one time they made the request that everything be sold through the dealer.

Q. Mr. Blair, did you ever enter into an agreement either with the dealer associations or with individual dealers to change your policy, as they requested?

A. No, sir.

Q. Did you ever adopt this policy of selling all cement through a dealer?

38904 A. We never did.

Q. Have you found any of your competitors selling all of their cement through a dealer?

A. No.

Q. Now, have you ever entered into any agreements with these dealer associations as to your prices or price policies and practices?

A. We have not.

Q. Mr. Blair, at these dealer conventions did the cement committee ever ask you to change your policy and sell cement f.o.b. the mill and allow the dealers to truck to destination?

A. No.

Q. Mr. Blair, did you ever reach any agreement with anyone with reference to your sales or marketing practices at the time of these dealers' conventions?

A. You mean anyone at those conventions?

Q. Yes.

A. No, sir.

Q. Well, would you tell us what the results or
38905 outcome of your attending these conventions have been?

A. Been largely the broadening of my acquaintance with the dealers in the part of the territory in Texas that we can serve from El Paso.

Q. We have been talking generally about attending these conventions. Just how often have you attended the conventions, say, of the Texas Lumber Dealers Association?

A. Once a year. They hold their meeting every April.

Q. The annual meeting?

A. Yes.

38906 By Mr. Withrow:

Q. By what type of transportation do you deliver most of the cement sold from the El Paso mill?

A. Carload shipments.

Q. That is by rail?

A. Yes.

Q. When did you start delivering cement by rail?

A. When the plant was first built, the first shipments were made in 1910, I believe.

Q. And why do you still ship the greatest part of the cement by rail?

A. Our plant was constructed before trucks were in use to any appreciable extent, and the plant was built in such a manner that that is the only means by which we can ship without some certain danger.

Q. Now, what is the minimum carload or rail deliveries from your mill?

A. Fifty thousand pounds, or approximately 132 barrels.

Q. Does that apply in your entire territory?

A. No.

38907 Q. Well, what part of the territory does it apply to?

A. That applies directly north and all points east of

El Paso; west of El Paso there is a 60,000 minimum which applies—which is roughly 160 barrels.

Q. Now, there has been some reference in the record here to some special rates down in the territory where you market cement on shipments of 100,000 pounds or more. Are you familiar generally with the existence of such rates?

A. Yes.

Q. How do those rates compare with the rates on the minimum carloads?

A. They are considerably lower, and they are just in a small zone around El Paso.

Q. Now, when you sell the customers in that zone and they take 100,000 pounds or more, do you give them the benefit of the lower freight rates?

A. We certainly do.

Q. And when you quote your prices, do you quote your prices on the 50,000 pounds or 100,000 pounds, or both?

A. Both ways.

Q. Now, has cement ever been delivered by truck from the El Paso mill?

A. Yes, sir.

Q. And is this done in trucks owned or hired by the Southwestern Company?

38908 A. No, sir.

Q. Do you deliver from time to time to customers' trucks at the mill?

A. Yes.

Q. What has been the attitude of the El Paso mill to making such deliveries to the customers' trucks at the mill?

A. We have tried to discourage it from the standpoint of the danger and risk involved, but we have never refused to do it.

Q. Now, has this always been your practice to discourage dealers from trucking?

A. Ever since I have been in the office, yes, and saw the condition that exists at the plant.

Q. Has this practice of yours at El Paso concerning discouraging the trucking of cement been the result of any understanding or agreement with your competitors?

A. No, sir.

The witness identified Resp. Ex. 2970 as a statement dated January 27, 1936 to dealers. He is under the impres-

sion it was to dealers in the territory immediately
38909 surrounding El Paso, referring to the truck deliveries that Southwestern had been making during the depression, and suggesting that they discontinue that now that times were better. It was mailed to the dealers around Southwestern's mill. The date on Resp. Ex. 2970 is in his handwriting. The volume of carload shipments had increased materially by January 27, 1936, and that had a bearing on the announcement of this policy.

(RESP. EX. 2970 was offered and received in evidence.)

38910 By Mr. Withrow:

Q. Now, in connection with this trucking of cement, did any special problem arise as a result of the delivery of mixed truckloads of high early strength and standard Portland cement?

A. I do not recall in particular. We have never encouraged the stocking of high early strength cement in any great quantities; for that reason, it is trucked more frequently than standard.

Q. Now, one or two times you referred to the practice, or the existence of trucking at your mill as being dangerous. Would you just explain, or tell us briefly what you meant by that?

A. The railroad tracks are located on both sides of our packing house, and the cars are—these tracks are inclined just the least bit so that they can be dropped after they are loaded by gravity. If is—the truck loading place is just below where the cars are being loaded on the east side of our packing plant, and if a car should get out of control it would be likely to strike and endanger the truck and the driver if the driver were on the truck.

38911 Q. Mr. Blair, I show you Respondents' Exhibits 2971, 2972, and 2973, and ask you to tell us what they are.

A. These are photographs of the carloading at the plant with particular reference to truckloading made one day last fall.

Q. And look at the reverse and tell us whether the description in each case as contained on the reverse side is correct.

A. That is correct.

Mr. Withrow: I offer in evidence at this time Respond-

ents' Exhibits 2971, 2972, and 2973 (handing the documents to Mr. Wooden).

Trial Examiner Norwood: Is there any objection?

Mr. Wooden: May I ask the witness one question?

Trial Examiner Norwood: Yes.

Examination on Voir Dire by Mr. Wooden.

Q. Were these pictures, Mr. Blair, made for the purpose of being offered in evidence here?

A. An another case.

Q. In the Texas case?

A. Yes.

Trial Examiner Norwood: Well, are you offering those to corroborate his testimony about it being dangerous to load trucks at his mill?

38912 Mr. Withrow: That is partly it, and I propose to go on in connection with other matter concerning improvement in the plant, whether or not they could be made and how expensive, in order to make truck loading economical.

Mr. Wooden: The pending offer is objected to as irrelevant and immaterial.

Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

Q. Have you ever considered improving the facilities at the El Paso mill for the loading of trucks?

A. Yes.

Mr. Wooden: That is objected to also, Your Honor.

Trial Examiner Norwood: The objection is sustained. I think you have gone into that enough. He has explained that to us sufficient.

Mr. Withrow: Well, I offer to prove through this witness that the Southwestern Company made a survey of their mill with reference to the problem of installing adequate facilities for loading trucks, and they found that it would cost in excess of sixty or seventy thousand dollars to erect a new pack house and loading platform; and I further offer to show through this witness that the volume of truck business at their mill is not large enough to support such an investment.

Trial Examiner Norwood: Counsel has his exception.

38913 By Mr. Withrow:

Q. How does the cost to the Southwestern Company of loading trucks and loading rail cars compare, Mr. Blair?

A. It is considerably larger; greater, to load trucks than it is cars.

Q. And in what way is it more expensive?

A. Well, the plant was designed for carloading primarily, and that is done automatic to the extent that the sacks are carried into the car door, or right at the car door by belt conveyors, and the men merely truck it into the end of the car, while with truck loading we must stop the car loading entirely, and the men truck—

Trial Examiner Norwood: Now, I am going to exclude any further testimony on trucking here unless you show me exactly what it is that is different from what has heretofore been shown.

Mr. Withrow: With Your Honor's permission, I would like to defer my offer of proof until either this afternoon or tomorrow on this matter.

Trial Examiner Norwood: Please do not include what you have already shown here about trucking.

Mr. Withrow: No, I won't, but I would like an opportunity to consider it.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

38914 Q. Have you ever employed a differential or mark-up for delivery to truck over the delivery to rail figures at your mill?

A. Yes, in small quantities.

Q. And when have you employed such differential?

A. That last exhibit showed.

Q. And the last exhibit, I believe, refers to 25 cents a barrel. Has it always been 25 cents?

A. No, I think since then that has been reduced to either 10 or 15 cents.

Q. And did you have any prior to that time, do you recall now?

A. I do not recall.

Q. And have those charges been sufficient to take care of your extra expense on this type of sale?

Mr. Wooden: That is objected to, if Your Honor please, as irrelevant and immaterial, and going into the question of costs, as such, of this company in loading trucks,

Trial Examiner Norwood: Well, when you sell this, do you sell it on a delivered price basis—when you are selling to trucks?

The Witness: We do not sell to the trucks, Your Honor.

Trial Examiner Norwood: What do you do?

38915 The Witness: We sell to the dealer or customer that is ordering the cement.

Trial Examiner Norwood: Do you sell the dealer on a delivered price basis?

The Witness: Some of that is delivered locally, which is at the El Paso price; some of it, for instance, in Arizona, is on a delivered price basis.

Trial Examiner Norwood: Based on the rail?

The Witness: Yes, sir.

Trial Examiner Norwood: Read the previous question, the question that was objected to.

(Question read.)

Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

Q. How did you arrive at the amount of the differential which you charged, Mr. Blair?

A. Merely estimated.

Q. And did you enter into any agreement or understanding with your competitors about the amount of the differential or surcharge?

A. We did not.

Q. Have you ever had any understanding or agreement with any of your competitors as to whether or not you should make this surcharge for trucking?

A. We have not.

38916 Q. What has been your experience, Mr. Blair, with reference to the size of the shipments when delivery is taken by trucks?

A. Very much smaller than rail shipments.

Q. Now, do you find in any of the territories where you market cement, Mr. Blair, that any of your competitors either truck cement or allow cement to be trucked from their mills?

A. Yes. In one territory that practice exists.

Q. Which territory is that?

A. Arizona. Shipments and price lists are issued on both trucks and carload basis.

Q. And do you meet that competition?

A. We do.

Q. And do you let dealers come from Arizona and take delivery at your mill for trucks?

A. Most of the shipments into Arizona are made by commercial truck lines.

Trial Examiner Norwood: Now, I do not know whether Counsel understood me or not, but I excluded any further testimony about this mill trucking unless you can make a proffer of conditions different from what you have shown heretofore.

Mr. Withrow: Well, as far as I know there is no testimony—

Trial Examiner Norwood: And I gave you time to make out your proffered offer. I understood that that
38917 would go over. We have been into this so many times; unless you have some new reason for it or some new condition we should not take the time on it now.

Mr. Withrow: Well, I understood Your Honor was ruling on the reasons why it costs more at the mill to allow people to come to the mill and to truck cement, and also on the matter of whether or not the differential charged covered costs. As far as I know, there was no ruling on the other matter, and there has been no objection. If Your Honor so rules at this time—

Trial Examiner Norwood: Yes. I so rule at this time.

The witness identified Resp.-Exs. 2974, 2795 and 2976 as summaries of cars and truckloads at the Southwestern plant for the years 1935, 1936 and the first six months of 1937. This information was prepared from Southwestern daily loading sheets which are made up in the office each day
38918 in the regular course of business. They were prepared under his supervision and direction and he can vouch for their accuracy.

Mr. Wooden: They are objected to as irrelevant and immaterial, Your Honor, in view of the testimony that the price on delivery to dealers' trucks is the same as though it were by rail.

Trial Examiner Norwood: The objection is sustained.

By Mr. Withrow:

38919 Q. Mr. Blair, have you ever entered into any agreement with any of your competitors to discontinue delivering to your customers' trucks at the mill?

A. No.

Q. Do you ever make shipments by water, Mr. Blair?

A. No, sir.

Q. Would you tell us why you do not?

A. There is not enough water in the Rio Grande most of the time.

Q. And have you ever, to your knowledge, deprived your customers of the benefits of water transportation?

A. No, sir.

38922 Trial Examiner Norwood: The stipulation is as follows:

It is hereby stipulated and agreed that if William R. Blair, sales manager of the El Paso mill of the Southwestern Portland Cement Company (hereinafter referred to as "El Paso" or as the "Company"), were to testify on his direct examination with respect to the matters hereinafter indicated, he would give as his testimony with respect to those matters the statements hereinafter set forth.

38924 (1) I am at the present time sales manager of the El Paso, Texas, plant of the Southwestern Portland Cement Company. I have held this position since February or March, 1927. I first became associated with the Southwestern Company in August, 1915, as cashier at the sales office at El Paso. This position I retained until 1917, when I became salesman for the company in New Mexico. I retained this position until 1927 when I was made sales manager of the plant.

(2) As sales manager of the El Paso plant, I have the duty of selling as much as possible of the products the plant can produce at the best price obtainable. From 1915 when I first became associated with the Southwestern Company, until 1927, when I became sales manager of the El Paso plant, I studied the general policies of the company which were then in effect in the territory with which I was concerned. These policies were followed by our company during these years because they worked well and pro-

38925 duced results. When I became sales manager of the El Paso mill, I continued in effect the general policies which we had been following because in the course of my field experience in selling cement it was my practice to observe the reaction of our customers to the practices of our company and to discuss our practices with them. I found that generally our customers were satisfied with these practices.

(3) The El Paso mill of the Southwestern Company is located about four miles from the center of the City of El Paso on the Rio Grande River. The plant is connected

with the main line of the Santa Fé railroad by a spur track. The limestone which we use in manufacturing cement at El Paso is obtained from our quarry, which is located adjacent to the mill.

38926 (4) When the El Paso mill was constructed, the nearest existing cement plant was located at San Antonio, Texas, 614 miles from El Paso. As originally constructed our mill had two kilns each having a straight 150-foot length and an 8-foot diameter with a capacity of about 35 barrels per hour, or a daily capacity of about 850 barrels. In 1917 we found that we had been able to dispose of all of the cement we could produce at El Paso, and the demand in our marketing area showed signs of increasing. At this time we installed a third kiln of the same dimensions as the two kilns we then had. In 1920 we found that the demand in our marketing area was still increasing and we altered one of our kilns by installing a 10-foot diameter burning zone, 51 feet 7 inches long, which increased the capacity of this kiln to about 50 barrels per hour. In 1923 we altered our second kiln by installing a similar burning zone and increasing its capacity to approximately 50 barrels per hour. In 1928 we sold over 1,000,000 barrels and found signs which indicated that the demand in our marketing area was still increasing. At this time we altered

38927 our third kiln by the addition of a 10-foot diameter burning zone, also 51 feet 7 inches long which increased the capacity of this kiln to approximately 50 barrels per hour. At this time each of our kilns was able to produce in excess of 1,000 barrels per day and in 1929 produced and sold more than a million barrels. The capacity of our mill has been expanded only when we have decided that the demand in our marketing area will consume the additional production which alteration would provide.

(5) At the present time our El Paso mill can produce more than 1,000,000 barrels a year. During at least each of three years while I have been sales manager, we have shipped over a million barrels and the plant was operating about as fully as possible. I think the practical maximum we can produce is about 100,000 barrels a month, provided we do not have to shut down any of our kilns during the month.

(6) During my experience at the El Paso mill, we have increased substantially the number of different types of

cement which we manufactured. When I first went with the company we manufactured one kind of cement and used one kind of package. We produced only standard Portland cement and packed it in cloth sacks. If a customer wanted a car of cement he got it all out of the same bin. At the present time we produce standard Portland cement and special cements, including two grades of oil well, modified, Government special, brick mortar, tufa, sulphate resistant,
high early strength and hydraulic plastic. At the
38928 present time, however, we produce more standard Portland cement than all other cement combined, namely, about 75 percent.

(7) Since I have been with the company, our standard Portland cement has improved in quality and, for example, it now attains a greater strength in a shorter time than it did even five years ago. This improvement in quality has involved more careful proportioning of the raw materials, harder burning, and finer finished grinding. Our testing laboratory tries constantly to improve the quality of our cement and our chemist does considerable research along this line. Throughout the manufacture of cement at El Paso we attempt to maintain constant uniformity in our product.

38929 (8) The Bureau of Standards and the A.S.T.M. have revised and refined the minimum standards for cement continually for many years. El Paso has to meet these standards in order to sell its cement, but we always try to make our cement so that it will always exceed these standards.

38930 (11) El Paso has never had an agreement or understanding with any of our competitors to the effect that the El Paso mill would or would not improve the quality of its cement, that it would or would not increase the number of different cements it produces, that any specifications would or would not be followed, or that any cements should or should not contain specific raw materials or specific quantities of raw materials.

(12) We have never built or serviced a silo,
38931 packing plant, or warehouse from the El Paso plant.

(14) The normal area in which the El Paso quotes and solicits business consists of the western two-thirds of Texas, eastern Arizona and nearly all of New Mexico. Located on the border between Texas and the Republic of Mexico, the El Paso mill was at

one time able to sell quite a lot of cement in Mexico. Recently, however, a very high import duty has been imposed on American cement going into Mexico. At the present time, this tariff amounts to $1.78 per barrel at the normal rate of exchange. In view of this 38932 tariff, we do not intensively solicit sales in the Republic of Mexico, although not long ago we sold 14,730 barrels of a special type of cement to the Mexican Government for use on a dam 90 miles below Augua Prieta Sonora, Mexico. At present, the import duty on cement coming into this country from Mexico is about 24 cents per barrel.

(15) The greatest distance to which we have ever sold cement from the El Paso mill is 1,250 miles, at Brownsville, Texas. This was done prior to 1927, when blanket freight rates on distances over 250 miles were available on shipments from the El Paso mill. As a result, rates on shipments exceeding this distance from each producing point were the same and El Paso was able to ship to Brownsville almost as cheaply as the San Antonio plant could. About 1927 these blanket rates were rescinded and El Paso was forced to withdraw from this market with regard to which the San Antonio mill had advantages of location. At present, the average distance which El Paso cement is shipped in Arizona is about 300 miles, in New Mexico about 310 miles and in Texas about 450 miles, or in general, our average shipment travels more than 350 miles. Generally speaking, the most distant markets in which we regularly sell our product, are Flagstaff, Ariz., 554 miles from our mill via the Atchison, Topeka and Santa Fe Railroad, and Phoenix, Ariz., which is 804 miles via the same railroad, and over 431 miles 38933 via the Southern Pacific Railroad. These shipments at great distances from our mill are possible because favorable freight rates are available to us. To the eastern two-thirds of Arizona the El Paso mill has rates as low as or lower than the rates from any other cement producing point. These rates, which are favorable to El Paso, were instituted about 1920 or 1921, at the time when an extremely large rural paving program was undertaken in Maricopa County, of which Phoenix is the county seat. These rates, in the nature of blanket rates, were put in for that particular job and the Southern

Pacific put in the same rates from southern California to Phoenix as from El Paso to Phoenix. Then the Santa Fe Railroad put in the same rates from southern California through Ash Fork and down to Phoenix and the same rates from El Paso to Phoenix. Thus, a shipment moving via the Atchison, Topeka and Santa Fe Railroad from our mill at El Paso to Phoenix, namely 804 miles, takes the same rate as the shorter route of shipment to Phoenix via the Southern Pacific, namely 431 miles. Rate to all points intermediate to Phoenix from El Paso are equal or less. This rate structure has been in effect for about 19 years.

(16) Since I have been associated with the El Paso mill of the Southwestern Company, new mills have been erected including the Republic mill at Longhorn, the Atlas mill at Waco, the Gulf mill at Houston, the Trinity mills at No. Fort Worth and Eagle Ford, and I think,
38934 Lone Star mill at Houston. Also, the mill of the Monolith Midwest Company at Laramie, Wyo. When these Texas mills started shipping cement, El Paso found that they quoted prices in southern Texas which were considerably less than the prices which had been quoted there previously. We found that we could not sell El Paso cement in this area at the prices we had been quoting but had to meet the reduced prices then being quoted by these new mills. These prices were so low that El Paso could not profitably meet them. As a result, the area in which El Paso solicited business was reduced by the establishment of these new mills. In addition to eliminating El Paso cement from southern Texas markets, these new mills also increased the competition which El Paso had to meet in New Mexico.

(17) Prior to July 1, 1937, our mill at El Paso had freight rates equal to or lower than the freight rates from other cement producing points to Phoenix, and to many other destinations in Arizona up to about 450 miles from El Paso. In New Mexico, due north on the Santa Fe, El Paso has an advantage for about 250 miles. North into New Mexico on the Southern Pacific, El Paso has an advantage for something over 300 miles. East in Texas, El Paso has a slight advantage up to about 300 miles. The average per capita consumption of cement in the territory which we serve is about one barrel annually in New Mexico

and about one-half barrel annually in Arizona, except during the past few years, when some large Gov-
38935 ernment work has run up the total consumption.

(18) In specific instances, business or personal reasons enter into the question of whether El Paso will make a shipment to a point far removed from our mills. Often a contractor or a dealer who is or has been a good customer will ask El Paso to ship him some cement for a project located at a considerable distance from our mill. In order to keep the good will of the customer and to keep our relations as friendly as possible with him, El Paso will make the shipment.

(19) In the territory southeast of El Paso where we market El Paso cement, we find the Dallas, San Antonio, Waco and Fort Worth mills, that is to say, the east Texas mills, the Kansas Gas Belt mills, and the Oklahoma
38936 mills soliciting business. To the north we have found the Fort Worth mills, the Kansas Gas Belt mills, the Colorado Portland mill at Portland, Colo., the Dewey and Oklahoma mills, and the mill at Laramie, Wyo., soliciting business. West of El Paso we compete with the southern California mills, including the Monolith, Riverside and California, also the Colorado Portland mill at Portland, Colo., and the Monolith Midwest mill at Laramie, Wyo. In addition, the Santa Cruz Company ships some cement into Arizona.

(20) At the present time, El Paso employs seven salesmen, who solicit business throughout the territory where El Paso cement is sold. Each of these salesmen is instructed to confine his solicitation to a definite area. Thus, four of El Paso's salesmen operate in Texas, two in New Mexico and one in Arizona. Each salesman is allowed a specific area, so that each one will have a definite area for which he is responsible. He gets to know the dealers in that area and keeps close account of the jobs there. This is the most efficient and thorough way of covering the territory which we have found. Our salesmen solicit orders from dealers, contractors, architects, in fact, anyone who might help them to get some business. We keep track of architects, in order to get them to specify El Toro cement. That this has been done indicates to us that the effort is worth while.

(21) Cement manufactured at the El Paso mill
38937 is sold at both delivered prices and f.o.b. mill prices. When I first became associated with the South-

western Company, most of our cement was quoted and sold at delivered prices. El Paso has continued to quote delivered prices both orally and in writing because our customers request delivered price quotations. I do not recall any instance other than Government requests where El Paso has been asked for a mill price. Customers always want to know what our cement will cost them at the point of use and request that we indicate the freight rate from our mill to their destination if we quote an f.o.b. mill price. This information is requested because most of our commercial customers are small dealers who do not have freight rate information available with which to calculate freight rates and because freight rate terms are so complicated that only experts can figure out specific rates from the tariffs. None of our customers employs a rate expert for the purpose of calculating rates. Many of our customers are located in small towns in which railroads maintain only skeleton station staffs, usually one man. Many of these stations do not have rate tariff files. If tariff files were available at these stations, the attendant would have great trouble figuring rates and would either have to have the figures confirmed by or would have to seek the rate originally from a central freight office. This process requires at least several days.

In addition El Paso has found that the shipper is
38938 not protected by the rate quoted him through a local railroad agent because if this rate is lower than the correct rate, the railroad or the agent is not bound by the quotation given to the shipper. The railroad assesses the correct rate on the shipment although a countercharge has originally been made or a rate quotation issued. In such a case our customer would end up with a total delivered price in excess of what he figured it to be. By quoting our customers delivered prices El Paso saves them the expense and inconvenience of calculating rates or of obtaining rate information, as well as the risk of loss due to mistakes in calculation.

(22) Generally, the price of El Paso cement is a figure quoted to a given customer. If, in connection with the shipment of the order, there is loss or damage to the cement in transit, El Paso files a claim with the railroad for it and credits the customer with the amount of the loss or damage. In the event that the railroad assesses an incorrect freight charge, El Paso files the claim for the

overcharge direct with the railroad and credits the customer with the amount of this overcharge. In cases of loss or damage to our cement in transit, El Paso requires that the purchaser send us the seal car record and the railroad agent's acknowledgment on the freight bill. This action is required in order to protect the company against claims for spurious or false loss or damage to shipments; also, we use these documents in trying to collect
38939 from the railroad any sums which El Paso pays out, if the loss or damage was due to the fault of the railroad.

(23) The El Paso mill has for many years prepaid freight charges on shipments to commercial customers when the customer did not have an office at destination and the payment of freight at that point would be a hardship for him. This is done as a matter of accommodation. El Paso has also prepaid freight on shipments to prepay stations, as well as on shipments to the United States Government and to State governments. For many years our customers paid freight charges at destination on other shipments. This payment was made for our account as a part payment of the purchase price.

(24) In December, 1939, El Paso found quotations issued by its competitors which indicated that freight would be prepaid on shipments to various destinations. From the number of destinations on shipments to which our competitors offered to prepay freight it appeared that this service was being offered to purchasers throughout many sections of the area in which El Paso solicits orders. While considering whether or not it would be advisable for El Paso to offer a like service to our customers, several of our dealers asked us whether El Paso would offer them this service before placing orders with us. El Paso did decide to meet this competition and has done so since. Prepayment of freight charges on all shipments is a burden to El Paso because we have to have a large cash
38940 balance on hand to make these payments. The added cost of this service has not been passed along to our customers because we have been meeting the competition that we find in the field in this matter.

(25) The El Paso mill sells cement f.o.b. mill to the Federal Government and to railroads. We sell the Santa Fe Railroad f.o.b. their rails at El Paso, our mill being located on a spur track connecting us with the main line of

this company. Our sales to the Texas & Pacific and the Southern Pacific Railroads are also made f.o.b. their tracks El Paso. There is, however, a switching charge from our plant via the Santa Fe to their tracks which we absorb, so that in effect El Paso sells the three railroads which serve El Paso f.o.b. mill. On sales to the Texas & Pacific Railroad we take into account competition from other mills located on this line, that is to say, the Ft. Worth and Dallas mills. The Southern Pacific Railroad runs northwest to El Paso from San Antonio and Houston. When we quote this railroad a price we take into consideration what we think the San Antonio and Houston mills are quoting. In quoting the Santa Fe Railroad we have competition from the mills located in the Gas Belt region on this line. In addition, we take into account the prices which we quote to the Texas & Pacific and to the Southern Pacific Railroads. In most cases, however, prices which we quote to these railroads are not as low as the
38941 prices quoted by other mills on their respective lines, that is to say, the Kansas Gas Belt mills have quoted the Santa Fe Railroad a lower figure than El Paso has quoted them, but we have learned that the Santa Fe takes into consideration freight and delivery charges so that on work located near El Paso our cement is purchased rather than cement from the Gas Belt mills. This has been our experience over a period of many years. Railroads have requested prices f.o.b. their rails and El Paso has so quotd and sold them ever since I have been with the company. These railroads do not use large quantities of cement at any one point; rather they use cement for maintenance work in small quantities at numerous points along their line. They can move this cement at special rates applicable to railroad property more cheaply than El Paso can move it at commercial freight rates. To date El Paso has seen no reason for changing our practice on sales to railroads.

(26). El Paso quotes delivered prices on cement to customers and prospecstive customers in towns throughout its marketing territory where a demand for cement exists or may arise. Within the area which extends west about 90 miles, north to Albuquerque, N. M., abou. 250 miles, and east in Texas about 90 miles to Sierra Blanca, El Paso determined its prices prior to July 1, 1937, by adding package, discount, and freight rate from our mill to

the destination in question to a figure at our mill. To
destinations in Texas, El Paso adds an additional
38942 five cents to cover the Texas State sales tax. We
have arrived at a figure at our mill after taking into consideration the market conditions in our marketing area, the prices quoted by our competitors and the price of competing materials. This figure was intended to cover our cost of production and all other costs except cost of transportation to ultimate destination, package charges, and discount.

(27) Within this area the El Paso mill has used this method of calculating its prices ever since the mill was established. For more than 250 miles around the mill in all directions the population is sparse and there is very little demand for cement. East of El Paso 275 to 300 miles are the West Texas oil fields which consume about 50,000 barrels of cement annually. This is the nearest cement market of any size to our mill. El Paso county itself is a fair market for cement, but outside of this county, the country of which I have been speaking is a vast undeveloped area of desert with no cement consuming population.

(28) El Paso has never found any of its competitors soliciting business in El Paso County. From time to time we have considered means of increasing the volume of our sales and have determined that reduction of the maxi
mum mill net at our mill would not enable us to exclude
any of our competitors from good marketing areas because
of the fact that there are no good markets within 300
38943 miles of our mill and because the freight rates
from our mill to large consuming centers more than
300 miles away are disadvantageous to us.

(31) El Paso sells all the cement consumed in the
area immediately around our mill and if it were
38944 possible we would prefer to sell all the cement we
produce in this area in which we are able to obtain
our maximum mill net. However, it is absolutely necessary for us to sell cement outside of this limited area in order to obtain a volume of sales which will allow us to operate our mill economically and to keep anything like a regular operation of our plant.

(32) Outside of this area El Paso has found that it is necessary to meet prices quoted by our competitors be-

cause cement purchasers are well informed and will not pay more for one brand of cement than for another brand.

38945 (34) Generally speaking, El Paso meets the lowest prices quoted in any given market by its competitors because we feel that we should get as good a price for our cement as our competitors get for theirs, in view of the fact that we are convinced that our cement is as good, if not better, than the cements manufactured by our competitors. When we have quoted prices lower than those which we find in the field, our competitors have immediately met these prices. Quoting prices which are lower than the prices our competitors have quoted has not increased the volume of our sales. Where our competitors have reduced their prices, our customers always gave us a chance to meet the lower price before taking their business elsewhere. On the occasion of price reductions, the volume of sales of our mill has not been increased although the general price level has declined.

(35) When El Paso finds that one of its competitors has quoted a price which is lower than the lowest price it has quoted at the particular destination, we meet this lower quotation immediately or forego the business. It has been my experience that our competitors act with equal rapidity under similar circumstances.

(36) In the event of price changes we receive information at the El Paso office almost immediately, always within twenty-four hours of the time the information is made public. Our information as to prices quoted by our
38946 competitors comes to us from two sources. Our salesmen are constantly contacting our customers and prospective customers. When they find that one of our competitors has quoted a price which is lower than the price we last quoted at the same destination, they immediately check for similar information in other markets and call the El Paso office to advise us of the change and the extent of territory in which they have been able to find reduced prices. Our salesmen also obtain information of competitors' prices by attending openings of bids submitted to public bodies. If for any reason they are unable to attend a letting or bid opening, they check abstracts of the bids to secure this information. Another source of our information is friendly dealers who call us

and tell us that one of our competitors has issued quotations reducing the prices at their destinations a certain amount. These dealers call me freely for this purpose at all times of the day and night, regardless of the hour or the inconvenience to me.

(37) When one or more of our competitors quotes prices lower than the lowest price which El Paso has quoted for the same destinations, we try to figure out whether or not the prospective business is attractive to El Paso at the lower figure. In deciding whether prospective business is attractive to us the first step is to reduce the delivered price to a net figure at our mill. El Paso has not established a minimum mill net figure which gov-
erns our decision as to whether or not we will seek
38947 business at a given figure or forego it because we cannot, at any given time, foresee all possible considerations which would govern our decision in a particular case. El Paso tries to net at the mill as much as possible but the actual decision depends upon the circumstances of each particular case.

(38) El Paso tries to follow the delivered prices quoted by its competitors so that we can meet their prices if they are lower than ours. In the event of a change in quoted prices, we do not check the delivered price quotations at every point at which we sell, or quote, but we do check these prices at as many points as we can and always at the locations of our important customers, and at major points of cement consumption in the territory where we solicit business. In order to find out what a competitor's delivered price may be at a point from which El Paso has not obtained a quotation, we check the quotations that we have been able to pick up and analyze them to determine whether their delivered prices reflect a definite net at a point of origin. If we find that these delivered prices appear to follow a uniform pattern, we estimate the price which our competitor may quote or may have quoted at such points. In analyzing price quotations picked up in the field we have found that our competitors appear to have used one or more points in figuring out their
prices. The figures which are apparently used at
38948 these points are sometimes called "mill bases" or "mill price bases." These terms may be defined in two or three different ways but my idea of a mill base

is the maximum amount which the sale of cement will net us at the mill. In this sense we have a mill base at our El Paso mill.

(39) The El Paso mill has never reported changes in our maximum mill net or so-called mill base to The Cement Institute, or to any of its officers. Changes in such figures are not announced to our customers nor have I ever advised any of our competitors of any figures which we might be using as our maximum mill net or so-called mill base. I have never sought such information from other companies. Since I have been sales manager at the El Paso mill we have never reported these figures to the Engineering News Record.

(41) Sometime around 1925, the Riverside Company put out a list of prices for points in Arizona. The rate structure in Arizona is peculiar in that there are over 245 stations having the same rate from Crestmore, of which over 140 of these stations have this same rate from El Paso. In addition, about 115 stations have the same rate from El Paso only. About 360 stations have the same freight rate either from Crestmore or from El
38949 Paso or from both mills. As we analyzed this price list it appeared that Riverside had determined its market prices at these 360 stations and had deducted the freight to obtain a mill net at El Paso to which they added freight to about 100 points in eastern Arizona where El Paso had the lowest available freight rate.

(42) I do not know why the Riverside Company reduced prices in eastern Arizona. Prior to the issuance of this price list, El Paso's prices in eastern Arizona had been calculated by adding freight rates to the destinations in question to the El Paso maximum mill net or so-called mill base. After this price list had been issued we found that in order to sell El Paso cement in Arizona we had to meet Riverside's prices.

(43) Prior to July 1, 1937, at the El Paso mill we calculated prices for most destinations in New Mexico by adding freight and other charges from our mill to destinations in New Mexico to the figure of $2.15 at our mill unless we found prices in the field which were lower than the sum of these figures. If we did find lower prices we quoted prices equally low unless we decided to forego the business. Quotations of southern California companies have

reduced prices in eastern Arizona considerably so that they are lower than El Paso's prices in western New Mexico. To offset this condition, which amounts to a difference of 20 cents a barrel in some cases, we have figured western New Mexico prices by adding to prices
38950 at eastern Arizona destinations the approximate truck haul rates from eastern Arizona points to destinations in western New Mexico. El Paso prices at western New Mexico destinations were initially calculated in this way sometime in 1935, and are still so calculated.

(44) At the El Paso mill we obtain freight rate information from our traffic manager who uses official railroad rates for this purpose. We have in the El Paso office a complete file of tariffs on cement from all producing points that are able to serve the territory into which we ship. Our traffic manager compiles these rates in a concise form in loose-leaf books.

(45) The practice of compiling freight rate books was being followed when I became associated with the El Paso mill, and has been continued ever since. Such a compilation is convenient for our purposes and is absolutely necessary because the ordinary clerk in our office would be unable to determine freight rates from official tariffs. I doubt that I would be able to find a rate to any particular point from the official tariffs in spite of my 24 years' experience with the Southwestern Company. Our rate books have proved to be efficient and economic and save a great deal of time. These rate books are compiled in loose-leaf form so that modifications may be entered by inserting new sheets if rates to a considerable number of destinations are revised. If only a few rates are
38951 revised we enter the corrections in our books in pencil.

(46) The rates in our books are stated in cents per hundredweight, and are used in connection with a conversion table which has been used ever since I have been associated with the company. Our rate books are used by our traffic department as an index to the lowest applicable rate. Having information as to the lowest rate it is easy for our traffic department to obtain the routing because they do not have to check every route to the destination in question. As soon as our traffic department finds a

route which is available under the lowest rate, that is, the rate stated in our books, the search is complete. In many instances it is unnecessary to check routes applicable on shipments of our cement because our traffic department knows the routes available to us almost by heart. When a check is necessary it is easily and quickly made with the help of our rate books. For this reason and also because the rest of our employees have no use for this information we do not include routing and weight information in our company rate books.

38952 We check carefully to see that the rates in our company rate books are the lowest available rates between the points stated in the book.

(48) The El Paso mill received freight rate books published by The Cement Institute when it joined the Institute in 1933 and for several years thereafter. These Institute rate books were used at El Paso for the purpose of checking the rates in our own rate book against those stated in the Institute books. During the time when our traffic department used the Institute rate books we always used the freight rate which we found to be correct according to the railroad tariff, if we found that the rates stated in the Institute books differed from the rates stated in our company books.

(49) The El Paso mill does not publish price lists. Our customers and prospective customers are advised of our prices by individual dealer quotations, which we
38953 send out from time to time. When the occasion demands we write or wire El Paso prices to customers. This latter method of informing customers is chiefly used with regard to contractors who request prices for special jobs on short notice.

(50) From constant solicitation, our salesmen are familiar with the last prices quoted by El Paso in a great majority of towns in their marketing areas. When one of our salesmen finds a price in the field lower than the last El Paso price he immediately gets in touch with the office at El Paso as I have previously stated.

(51) When quotations involving an increase in price are issued by El Paso, we have followed the practice of giving our customers advance notice of the effective date of this change. The amount of notice has varied. We have found that our competitors have a practice of announcing price increases to the trade sometimes as much as 20 days

prior to the effective date of the price advance. Under the N.R.A. Code it is my recollection that we were required to give five days' notice of price changes, and at times since then El Paso has given similar notice.

(52) Building material dealers place many more orders with us than with any other type of customer. In some years 81 percent of our sales are made to dealers, the average over a period being slightly less. It has been our experience that dealers purchase a larger quantity of our cement than any other type of purchaser, even in times of greatly reduced demand. In the marketing
38954 of cement our dealers play an important function. They carry it in stock at all times and sell at retail quantities from one sack up. We would be unable to sell cement at retail in this manner without considerably increased cost. Our dealers also have contacts with contractors and other consumers in their territories. Often these potential consumers are personal friends of our dealers of many years standing. In this way dealers have contacts which it would take us years to establish. Our dealers also keep in close touch with local jobs and projects. In this way they have a greater knowledge of local construction than we could obtain without going into retail distribution on an elaborate scale. These dealers also carry supplies of other building materials which oftentimes give them inside tracks on possible demands for cement.

(53) Our dealers, with few exceptions, in the immediate vicinity of our mill, do not handle our cement exclusively. In our marketing territory the exclusive dealer is a great rarity. Our competitors are constantly trying to sell more of their cement to dealers who handle our cement. In the same way we try to get dealers to stock more of our cement than any other brands. In other words, each producer in our marketing territory is trying to make exclusive dealers for his company out of each existing dealer but no one producer is wholly successful to my knowledge.

(54) Our dealers are in a good position to turn
38955 business from one brand of cement to another and also to push competing materials, such as brick. It has been our experience that dealers are a valuable asset to our company and we are constantly trying to line up good dealer outlets.

(57) When I first became associated with it, the
38956 El Paso mill followed a practice of selling to consumers who ordered a car or more at a time. Most El Paso customers were mining companies and building material dealers which were financially sound and had an established place in their communities. This practice was followed because we found that our business interests were advanced by having a well defined practice on this
38957 matter so that when our salesmen were approached they would be able to make a definite statement. During my experience as a salesman in New Mexico I found this particularly desirable because I was often approached by small contractors who wanted to buy 100 barrels of cement. Most of these small contractors at that time, and as well as at the present time, are not well financed and often prove a bad credit risk. It has been our experience that they always put off paying for cement as long as they can. Because our company had a definite practice I was able to tell these men that we did not sell to contractors direct on such orders because we were wholesalers, not retailers. I would then suggest the most conveniently located dealers as a good source of supply. I would, of course, get in touch with the dealer and tell him that this contractor was in the market for cement. In this way I was able to avoid an inconvenient shipment for the company and at the same time increase the good will of our dealers. From about 1930 to the present time our distribution announcements have set forth specific classes of customers to whom we sell direct. El Paso does not sell direct to all purchasers because we are not in a retail business and we cannot undertake that function without complete reorganization of our company. Also, we have found that distribution of most of our cement through dealers is an economic and efficient method which we can-
not duplicate profitably. If we were to sell cement
38958 to anyone at the present time we would, in fact, be competing with our dealers who would then take their business elsewhere. This would be a serious, if not fatal, handicap to our company. El Paso has never agreed with any of its competitors or with its dealers to maintain a classification of customers. El Paso cement has been distributed in accordance with conditions with which we were faced in the area where we market our cement.

(58) During the Code period El Paso did abide by the

provisions of the Code with respect to direct sales. Article XI of the Code of Fair Competition, which provided for sales by producers, represented in general a codification of practices which we had been following for many years as company policies.

(59) El Paso has never agreed to follow any distribution practice. It has advised its dealers of its practices from time to time so that they would know exactly where we stood on these matters. At the present time El Paso sells W.P.A. requirements through dealers because these orders involve small amounts which have to be serviced.

(60) At the present time El Paso also sells direct to regularly established Government agencies for projects using large quantities of cement and to large mining companies because these purchasers have no need for any type of dealer service. They also are good credit risks and order large quantities of cement at a time. Direct sales of El Paso cement are also made to railroads because railroads take delivery of their cement f.o.b. their rails and distribute it along their tracks, wherever it is needed. In connection with this type of work, dealer service is unnecessary.

(61) At times El Paso sells direct to contractors but has no strict policy as to when it will or will not so sell. We consider each request and the nature of each of the projects separately in making our decisions. In considering a particular project we take into account the amount of cement to be used, delivery schedules, any previous dealings we have had with the contractor, his financial status, the condition of our sales and our mill, and all other facts which might affect us on the particular transaction.

(62) In the course of my experience I have observed that our competitors have quoted direct to contractors to whom El Paso has not so quoted. At other times El Paso has received complaints from its dealers because it has made direct quotations on certain projects on which its competitors had quoted through dealers. We do not know in advance how any of our competitors may quote for a given project.

(63) El Paso obtains information concerning the practices of its competitors on this subject from friendly dealers who send in copies of policies and announcements issued by our competitors. In addition, of

course, our salesmen pick up copies of these announcements in the field whenever they can and forward them to the El Paso office.

(67) At the present time El Paso restricts the sale of its cement to dealers who can market it well and who are good credit risks. For a long time we have confined our sales to dealers who are able to meet these requirements in their local markets. It is our general policy to limit our sales to dealers, to those who meet this conception of a dealer, because dealers are our most important outlet, and are the main stay in the distribution of our cement. For this reason, we must have responsible individuals with good credit who are capable of performing adequately the functions we feel a dealer should perform. This policy has been in effect at our El Paso mill for at least 20 years. We began to confine our sales to dealers, to those who possess these qualifications for the same reason that we adopted the practice of making direct carload sales, namely, that it protected our salesmen and our company from unpleasant and unreliable accounts.

(65) In applying these qualifications to an individual dealer, El Paso has no rigid rule. We believe that so long as a dealer can satisfy the requirement of his par-
38961 ticular community, he will be considered a dealer for our company purposes. In determining whether a given dealer can satisfy the requirements of his particular community, El Paso salesmen investigate the man's facilities, his ability to serve his market, his reputation and integrity, and his financial status. We usually check his credit ratings and his financial status in the El Paso office, if we can, as a cross-check on the report of our salesmen. During my experience with the El Paso mill, I have found that our competitors sell to persons whom we do not consider qualified to serve their community or whom we do not consider good credit risks.

(66) Although at El Paso we have had a rather clear conception of a dealer for many years, I do not recall seeing a written definition until the N.R.A. Code was published. Throughout my experience with the company, our concept of a dealer has not changed. When the N.R.A. Code appeared, it included a definition of a dealer in simple, concise language. In announcements which our company has sent out since this Code appeared, we have incorporated substantially the definition of a dealer which

appeared in the Code of Fair Competition because it seemed to me to be the clearest statement that I had seen of the concept which we had had at the El Paso mill for many years.

(67) In 1937, the terms of sale and discount on cement produced at the El Paso mill were 10 cents per bar-
38962 rel for payment within 15 days of date of shipment or 30 days net. In Arizona our discount was 20 cents per barrel if payment was received on or before the 10th of the month following the date of shipment. El Paso's terms of sale and discount have been different in Arizona than they have been in Texas and New Mexico because we met different competitive conditions in Arizona. Generally speaking, we tried not to make exceptions to these terms of sale but sometimes the Government prevailed upon us to make the discount apply during the 15-day period after the arrival of the cement at destination, rather than during the 15-day period after the date of shipment. On occasions such as this, El Paso's terms have been varied to meet particular situations. In addition, El Paso would probably accommodate a dependable customer who encountered temporary adversity. In my experience, I have found that the terms and conditions of sale on our cement are generally as good as those offered by our competitors from the viewpoints of the purchaser. If El Paso were to offer terms and conditions of sale more favorable to our customers than those offered by our competitors, our competitors would meet this price reduction as soon as they discovered it so that we would gain no advantage. Likewise, if one of our competitors offered terms more favorable to customers than ours, El Paso would have to meet these terms or forego business available at destina-
tions where our competitor had made the terms
38963 available. The El Paso mill has never allowed a quantity discount on sales of its cement. Savings in production cost result from continuous operation of the mill rather than from large quantities in individual purchases. For our purposes, this means that a steady flow of business is important to us. One hundred men who buy one carload, and the man who buys 100 carloads are on a par for this purpose. If we can run our mill continuously on a constant ratio, we would probably allow our customers quantity discount, but this situation has never existed during my experience at the El Paso mill. No matter how

hard we try to spread our shipping, it has always ganged up on us during the summer and has always fallen off during the other seasons.

(68) Government contracts for large quantities of cement which involve definite shipping schedules have a greater tendency toward assisting in a continuous operation of our mill than any other business we have had. On the several Government contracts of this character which we have had El Paso has not allowed the Government a quantity discount because we bid special prices on these orders which are lower than prices we quote on commercial business, and take full account of delivery schedules and quantity. This is as good if not better than a quantity discount. Government orders often involve special cements as well as extra service on our part, such as testing, sealing bins, bid bonds and other services. These involve
an extra expense which is not present in connection
38964 with commercial business and which vary with the individual order. It is easier for us to take these factors into consideration in quoting a special low price to the Government than it would be for us to figure out a quantity discount on each of these orders.

38970 Mr. Wooden: My objections are to follow, and they constitute also a motion to strike:

38971 Paragraph numbered (24), irrelevant and immaterial.

38980 The witness identified Resp. Ex. 2977-A and B as a distribution policy sent to the Texas dealers in July 1935. Southwestern had picked up in the field a competitor's policy which was much more advantageous to the dealers than the one under which Southwestern had been operating, and Southwestern felt it necessary to meet that immediately in order to protect its dealer position. He could not recall from memory any of the respects in which the competitor's new policy was more advantageous than Southwestern's previous policy, unless he could see the old policy and compare them.

Examination by Trial Examiner Norwood.

It was different from this policy. This one reserved more business to the dealer than the former one, as he recalls.

Examination by Mr. Withrow.

Referring to paragraph 2 on Resp. Ex. 2977 B
38981 he believed "the former policy made no statement of that 50 percent being located in the cities, towns, and villages." Prior to that time that was also through contractors.

(RESP. EX. 2977-A and 2977-B was offered and received in evidence.)

By Mr. Withrow:

Q. To whom was this announcement sent?

A. Texas Lumber and Building Material Dealers.

Q. Did you apply this policy to dealers outside of Texas?

A. No.

Q. Did you adopt this policy as the result of any agreement with any of your competitors?

A. None whatever.

38986 By Mr. Withrow:

Q. Mr. Blair, you testified that prior to the issuing of Respondents' Exhibit 2977, you had picked up an announcement of a competitor. Is this the announcement that you referred to (handing a paper to the witness)?

A. It is.

Q. And would you tell us when that was received in your office?

A. July 22, 1935.

Q. What was the source of it?

A. It was sent in by our salesman A. P. Magruder, San Angelo, Texas.

38987 The witness identified Resp. Ex. 2979 as a statement of discount policy of Colorado dated August 20, 1926, which Southwestern secured through the Santa Fe Builders' Supply Company at Santa Fe, New Mexico. After finding the Colorado Company had announced new terms and conditions of sale it met those same conditions.

38988 (RESP. EX. 2979 was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Blair, will you look at Respondents' Exhibit 2979, and tell us how long you have employed terms and conditions of sale similar to those referred to in that exhibit?

A. We are still giving, to this date, the discount on 15-day payment.

Q. That document refers to 10 cents per barrel, does it not?

A. This says the usual cash discount.

Q. Could you tell us, if you know, what cash discount you were giving back in 1926 in that territory?

A. We were giving 10 cents a barrel at that time. I do not recall just the date that that was initiated.

38989 Q. In the stipulation you refer to giving a cash discount of 20 cents per barrel in Arizona. Do you recall which that originated with your company?

A. No; I cannot fix the date.

Q. During the N.R.A. Code the discount was fixed by the Code of 10 cents per barrel. Do you recall under what circumstances you changed it in Arizona back to 20 cents?

A. As I recall, the 20 cents per barrel discount had been in effect in Arizona prior to the days of the Code, but during the Code we conformed to the Code in that respect, and as soon as the Code went out we resumed the former terms of 20 cents per barrel discount on the 10th of the month proximo, as had applied prior to the days of the Code.

Q. Mr. Blair, have you found that some times some of your dealers diverted shipments from one destination to another destination?

A. That has occurred a few times, yes.

Q. What position has the Southwestern Company taken with respect to such diversions?

A. We have opposed any such practice.

Q. Would you tell us your reasons for opposing such practice?

A. Well, there are two main reasons. One is that, as a rule, the dealer diverting the shipment does not have a yard or place of business in the town to which he is diverting or trying to divert the car, and that, of course,

38990 gets us in trouble with the dealer located at that point. Another reason, and the only other reason that I can recall offhand, is that it is usually attempted to divert from a point that has a better net for us into one that has a lower net, and thereby we are deprived of the proper return on the cement for the point to which it is shipped.

Q. Now, have you taken any steps whatsoever to overcome this diversion of cement?

A. We have remonstrated with the dealers and sometimes we have put a stamp on the bill of lading that prevents diversion.

Q. Have you ever tried to control the use which a dealer might make of your cement after it has been delivered to him at the point where he is located?

A. No.

Q. Do you refuse to sell to dealers for delivery to points other than points where they have a yard or warehouse?

A. Yes. If there is another dealer located at that point. There are some cases where it is intermediate, and where we make no objection to such shipments.

Q. Now, referring to the stamp on the bill of lading, do you recall what this stamp provides, in substance?

A. Well, it reads something like this: This is the property of the shipper and is not to be diverted without his consent, or words to that effect.

Q. And where did you get the idea of using such a stamp?

3890 A. As I recall, one of our salesmen picked up a bill of lading carrying that, and we copied it.

Trial Examiner Norwood: Did you get it from any other source?

The Witness: One of the railroad men mentioned it to me at one time.

By Mr. Withrow:

Q. Do you recall about when you began using this bill of lading stamp?

A. We do not use it except on spasmodic occasions. We do not use it as a general practice at all.

Q. Did any committee of The Cement Institute provide you with information concerning such a stamp on the bill of lading?

A. I don't recall ever seeing it in anything from the Institute.

Q. Did you ever discuss the question of the bill of lading stamp with the representative of any cement company?

A. I do not recall any discussion regarding it. They may have asked me at one time or another if we used such a stamp.

Q. Did you enter into any agreement or understand-

ing with any of your competitors that you should stamp the bill of lading?

A. None whatever, because we do not use it as a general practice.

Q. Could you fix the date, Mr. Blair, when your salesman reported that he found a competitor using a
38992 bill of lading stamp, such as you just mentioned a few moments ago?

A. No; I cannot. I have nothing to fix it by in my mind.

Q. Have you ever required your customers to return to you the original billing, in order to prevent diversions?

A. No, I do not believe we have ever required the return of the original bill of lading.

Q. What action have you taken, or do you take when you discover that a shipment has been diverted?

A. Try to collect on the basis of the point to which it was diverted. At one time we lost the customer.

Q. Well, why, in the case where you lost a customer did you risk losing a customer and collect on diversions, in attempting—

A. I believe he was ordering for one of the lowest priced points in Texas, to which we shipped at that time, and the business was not attractive, so we decided to forego the business rather than to continue such a practice.

38994 The witness identified Resp. Ex. 2980 as a document prepared in Southwestern's El Paso office under his supervision. The green line west of that, in Texas, represents the territory where he markets cement in Texas. West of the red line appearing on the map is the territory where Southwestern has a freight advantage. He can vouch for the accuracy of the map.

The witness identified Resp. Ex. 2985 as a statement of shipments from El Paso by zones for the years 1930 to 1938, inclusive, which was prepared in his office under his supervision. He can vouch for the accuracy of it;
38995 Resp. Ex. 2986-A as a recapitulation of El Paso's shipments for the years 1930 to 1938, inclusive, [divided] into zones where Southwestern has the advantage, into neutral zones and into zones where Southwestern has a disadvantage of freight; also the states of Arizona, New Mexico and old Mexico. It was prepared in his office under his supervision and direction. He can vouch for

the accuracy of it; Resp. Ex. 2986-B to F, inclusive, as the shipments by counties throughout Texas for the years being the data from which the recapitulation was made; Resp. Ex. 2981 as a recapitulation of shipments into Texas, Arizona, New Mexico, and Old Mexico for the year 38996 1928, which was prepared in his office under his supervision. He can vouch for its accuracy; Resp. Ex. 2982-A to E as similar figures for the year 1932; Resp. Ex. 2983-A to E as similar figures for the year 1935.

Examination by Trial Examiner Norwood.

He verified these figures from the record.

Examination by Mr. Withrow.

The witness testified that Resp. Exs. 2981, 2982, 2983, 2985 and 2986 were prepared from the shipment records which Southwestern maintains in its office on a card system.

The witness identified Resp. Ex. 2984-A and B as a statement showing the area in square miles and the population of counties in the various territories that Southwestern serves in Texas, and also an average figure of the population by square miles for the various counties, 38997 and an average for the various sales territories in which our territory was divided. This was prepared under his supervision and he can vouch for the accuracy of it. The figures contained in the tabulation were taken from the U. S. census of 1930.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibits 2980, 2981-A to E, 2982-A to E, 2983-A to E, 2985 and 2986-A to E; and I propose subsequently offering Respondents' Exhibit 2984-A and B. I will do that in a few minutes.

Mr. Wooden: May I ask the witness a question voir dire?

Trial Examiner Norwood: Certainly.

Examination on Voir Dire by Mr. Wooden.

Q. When and for what purpose were these various compilations made up, Mr. Blair?

A. They were made up last year for introduction in the other case.

Q. Do you mean the Texas case?

A. Yes, sir.

38998 Q. Against your company and the other Texas companies?

A. That is correct.

Mr. Withrow: I object to going into the matter of the Texas case. It is not relevant or material to any of the issues, and it is not relevant or material for what purpose these documents were made up. There is no testimony in the record that they were made up in the regular course of business. There is testimony that they are tabulations taken from the books and records of this company. He vouches for the accuracy, and under the stipulation entered into between Counsel for the Commission and Counsel for the Respondents that identification and those statements make the documents admissible in this proceeding.

Trial Examiner Norwood: The objection is overruled. He may tell us about this. It bears only on the identification of the papers for which they were offered.

Mr. Withrow: Well, Your Honor will listen to the last question, it has nothing to do with the identification of these documents in any way.

Mr. Wooden: It has to do with the status of these documents.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: The witness' testimony is that they were made up for the special purpose, and not in the

38999 regular course of business.

Mr. Withrow: That is right.

By Mr. Wooden:

Q. Were these made up, Mr. Blair, for the purpose of showing what you thought would be the effect of selling f.o.b. mill on your business?

A. To show how it would be impossible for us to sell f.o.b. mill and dispose of sufficient business in that territory.

Mr. Wooden: Your Honor, I object on the ground that the exhibits are irrelevant and immaterial, and are merely speculative, and go to the proposition of what he said would happen if the Respondents could no longer use a basing-point system, which is alleged to be the result of illegal action.

Mr. Withrow: Regardless of the testimony of Mr. Blair as to the purpose for the documents being prepared, they reflect what the situation was and what the sales were, and

I am offering them solely for that purpose, to show where his sales and shipments were made, and I intend to argue from that the effect that the past transaction has on his method of doing business.

I also want to show the character of the territory and the volume of shipments in the territory where this company markets cement, because we propose to argue that the method of pricing and marketing followed by this
39000 Respondent has resulted from the type of territory marketwise that this company feeds. It has nothing to do with this issue which Mr. Wooden attempts to raise here about what the effect would be if they sold f.o.b. mill, or if they had to sell f.o.b. mill.

Trial Examiner Norwood: The objection is overruled. They are received as marked.

(RESP. EXS. 2980, 2981-A to 2981-E, 2982-A to 2982-F, 2983-A to 2983-E, 2985, and 2986-A to 2986-F were offered and received in evidence.)

Direct Examination (Continued) by Mr. Withrow.

Q. Mr. Blair, I notice that on Respondents' Exhibit 2984-A and B you have divided the State into certain territories. Would you tell me why those divisions were made and what the basis of the division is?

A. The division is the division of the State by sales territories. In each of these territories listed here we have a salesman headquartering who works and is responsible for the territory.

Q. In other words, those are divisions made by your company?

A. Yes, sir.

39001 (RESP. EXS. 2984-A and 2984-B was offered and
39002 received in evidence.)

By Mr. Withrow:

Q. In your stipulated testimony, Mr. Blair, there is a statement that you sell the Government f.o.b. your mill at El Paso. Do you sell also to the Government at delivered prices?

A. Yes.

Q. And under what circumstances did you sell the Federal Government at delivered prices?

A. Where they requested bids both ways, we as a rule bid the delivered prices.

Q. And how does the Federal Government usually, where land-grant rates are not involved, how does the Federal Government usually take the cement, f.o.b. your mill or delivered?

A. F.o.b. our mill if land-grant rates are involved.

Q. And if they are not involved?

A. Well, they usually take it f.o.b. destination.

39004 Q. In your stipulated testimony, there is a statement concerning better prices to the Federal Government.

Would you give us a specific instance of such a price, Mr. Blair?

A. Our bids for the Conchos Dam project in New Mexico were under the market prices at the time; bids were taken three different times.

Q. And would you tell us how you arrived at the prices you bid in the instance of the Conchos Dam?

39005 A. Mr. Merrill, our general manager, and I figured out the bid which we felt would secure the business and give us a profit on that transaction.

By Mr. Withrow:

Q. Are your prices to the Federal Government ever higher than your commercial prices to the same destination?

A. I do not recall any such instance.

Q. Are your prices ever lower than the prices quoted by your competitors on Federal Government business?

A. I think they have been. They were on the Conchos, anyway.

Q. Mr. Blair, have you any data as to the amount of your cement which has been sold to the Government for W. P. A. work through your dealers?

A. We have never secured any such figures, and I doubt if we could secure such a tabulation.

Q. Could you tell us whether or not in the territory surrounding your mill there has been a large volume of W. P. A. business?

A. I would say that there has been no large volume of that kind of work.

39006 Q. Now, on the small Government orders, what is your policy with reference to price? Is it the same or different from your commercial price?

A. As a rule, it is the same as the commercial price at those points.

By Mr. Withrow:

Q. What are your reasons for selling the Government at the same price in this type of orders as on commercial business?

A. It is no more attractive than any other business tendered to us in the same volume.

39007 Q. Have you ever received awards from the Federal Government on large projects?

A. Yes, on several large projects we have received awards.

Q. Exclusive of those years when you were shipping on the one or two large awards, has the Government purchased a large percentage of your shipments annually?

A. No; not since the early days, when we were shipping on the Elephant Butte Dam, and later on the Roosevelt Dam in Arizona—I should say the Coolidge Dam. We did not ship on the Roosevelt Dam, I believe, to my knowledge.

Q. Now, could you tell us how your sales expenses in connection with these small sales to the Federal Government compared with the sales expenses on your commercial business?

39008 A. I cannot tell that there is any difference in that. They usually require about the same amount of work. Usually, if anything—

Q. Which one, in your experience, have you found to be more expensive and more burdensome?

A. Well, if anything, one small order from the 39009 Government would be more expensive than one order from a dealer, we will say, because of the red tape involved in it.

Q. Is there any advantage to you in the fact that the Government is a cash customer?

A. No; most of our customers take the cash discount and take it within the terms better than the Government does.

Q. And when you say "most," about what percentage of your commercial customers take the cash discount?

A. I cannot give you any exact figure, but I would say it was better than 75 percent.

39012 By Mr. Withrow:

Q. Now, Mr. Blair, would you tell us whether or not you have ever bid a delivered price to the Government and stated that they could deduct the commercial freight to arrive at the f.o.b. mill price?

A. We have.

Q. Now, prior to the N. R. A. Code period, had you ever used a so-called control clause; that is, a clause about deducting the freight rate in bidding to the Government?

39673 A. Not to my recollection.

Q. And was it during the Code period that you started that practice?

A. Yes.

Q. Did you ever have any difficulties or complaints from the Government purchasing agents with whom you dealt over the use of a control clause?

A. No. We only used it a very few times.

Q. Did you adopt or use the control clause because of any agreement or understanding with your competitors?

A. None whatsoever.

Q. Would you tell us whether or not you obtained a copy of this control clause as a part of your filing made with the N. R. A. Authority?

A. I am of the opinion that the one that we got was off a bid which was filed with the Government.

Q. Now, do you recall when you abandoned using this control clause?

A. No.

Q. Was it prior to July, 1937?

A. Yes.

Q. Have you ever used a freight equalization clause, do you recall?

A. We may have used it once or twice, but I have a recollection of a statement from some Government
39674 agency that we would be penalized below a certain figure that we were willing to go to if we put that on, so we have just discontinued using any equalization clause.

Q. Was this instance that you are referring to prior to July 1, 1937, do you recall.

A. I am of the opinion that it was.

Q. Now, you testified a little while ago that if the Government asked for bids on both cases, that is, f.o.b. mill and f.o.b. destination, you usually bid delivered price. Now, in those instances do you allow the Government to deduct the commercial rate from El Paso to the destination in question?

A. Yes; and we usually show the freight rate per hun-

dredweight, and also I think also per barrel, although I am not certain of the per barrel figure.

Q. How long have you been making this type of bid to the Federal Government?

A. For several years.

Q. And that goes back prior to July, 1957?

A. Yes.

Q. And if the Government accepted one of those invitations and had taken the delivered price, adding the commercial freight rate, have you delivered the cement to them f.o.b. mill?

A. Ye ; but I think they have only taken those where land-grant rates were involved. They have always accepted our delivered bid otherwise.

Q. When you bid on Government invitations in territories involving land-grant rates, where do you get the land-grant rate information?

A. Our traffic department secures those from the railroads involved, as a matter of check against his own figuring on those jobs.

Q. What information, do you know, does your traffic manager have on hand from which he can figure land-grant rates?

A. He has had some of these land-grant circulars, and then we have also asked our salesmen to secure what land-grant rates they can from governmental agencies, where bids have been involved, on which we have bid.

Mr. Wooden: Your Honor, I would like to call your attention to the fact that this testimony adds nothing whatever to what we have heard from dozens of witnesses produced both by the Commission and the Respondents.

Trial Examiner Norwood: Why do you want to bring that out, when it has been so well covered?

Mr. Withrow: Because Counsel for the Commission have attempted to show and prove that land-grant rates are a mystery, and that the basic information about land-grant rates, the circulars, and so forth, was only in the possession of the Government, and that there must be an agreement to fix their prices or else cement companies, and in particular this Respondent, could not figure land-grant rates and could not figure the delivered price or destination cost involving land-grant rates.

Trial Examiner Norwood: Don't you think we have covered that, until there is no longer anything to be added to it?

Mr. Wooden: One of their own witnesses, within the last two weeks, testified and gave us the facts on that in a very accurate way.

Trial Examiner Norwood: If there is anything new about this, he may tell us, but we have not the time to go over the whole story with every witness, and he should not attempt to do it.

Mr. Withrow: If Counsel for the Commission is willing to concede that this company secures its land-grant rate information both from governmental agencies showing the land-grant rates in previous transactions, and from its own rate department, which has on hand the governmental circulars concerning the land-grant rates issued by the quartermaster general of the United States, I will not go any further. Otherwise, I think, because of the nature of the Commission's proof, that absolutely every Respondent concerning which they have put in any evidence involving land-grant rates has a right and should put in information as to how it secures this land-grant information.

Mr. Wooden: Your Honor, when we first put in our evidence on the activities of the Institute as to land-grant information, it showed right on the face of those exhibits, that we put in that the sources of their information were from the Government and from the railroads.

By Mr. Withrow:

Q. Can you tell us how the Southwestern Portland Cement Company secured the circulars issued by the Quartermaster General?

3901S A. I think they were secured through the Chamber of Commerce, which has a very efficient freight rate bureau.

By Mr. Withrow:

Q. That is the Chamber of Commerce of El Paso?

A. Yes.

Q. From what railroads do you obtain land-grant rate information?

A. The Santa Fe and the Southern Pacific principally.

Q. And the—

Trial Examiner Norwood: Now, I shall not allow another question on this, until counsel can show me that he wants to bring out something new on this subject. He has had the privilege of submitting the stipulation, and

he has the privilege of adopting the testimony that is in here, and he is offering nothing but familiar information, which we have received many times, and we have not the time for that now. Some concession must be made to that.

39019 Mr. Withrow: In view of Your Honor's ruling, I would like to offer to prove, through this witness, that the Southwestern Portland Cement Company has found that the land-grant rates calculated by its traffic department, and checked with the railroads, have usually been found to be correct and the same as that calculated by Government rate clerks; that there have been a few occasions where different rates were reached, but that no determination was made in those cases as to which, whether the Government or the Southwestern Company employee, was correct; that the Southwestern Portland Cement Company, in the matter of land-grant rates, attempts to check the rates calculated by its own traffic de-

39020 partment with the rate information which it can secure from the railroads which serve its plants, and also with the land-grant rates employed by the United States Government in making settlement on previous invitations and bids to the Federal Government.

I further offer to prove, through this witness, that in the event a discrepancy or difference is found between the rates obtained by the Southwestern Portland Cement Company from various sources, the Southwestern Company employs, for all purposes, the lowest rate, thereby giving the Federal Government any advantage which might accrue.

39022 Washington, D. C.,
Wednesday, May 22, 1940.

39032 Before the Honorable John W. Norwood, Examiner
Federal Trade Commission—Docket No. 3167
In the Matter of The Cement Institute, et al.

It is hereby stipulated by and between Federal Trade Commission (hereinafter referred to as the "Commission"), and the Respondent, Marquette Cement Manufacturing Company (hereinafter referred to as "Marquette"), by their respective attorneys appearing in the

above-entitled proceeding before the Honorable John W. Norwood, Examiner, on the 22d day of May, 1940, that:

1. The statements herein set forth shall be incorporated into the record of the above-entitled proceedings in lieu of testimony offered on behalf of Respondent Marquette, with the same force, weight, and effect as if D. S. Colburn had personally appeared and so testified.

2. D. S. Colburn entered the employ of Marquette in August, 1924, as an engineer in connection with service, and served the company in that and related capacities until the late spring of 1933, when he was appointed as Assistant to the President of the Company, Theodore Dickinson, and about that time was given general supervision over matters relating to the formulation of a Code of Fair Competition for the Portland Cement Industry in so far as Marquette was to and did take part therein, and continued so to serve until 1934 when, following the annual meeting of the Company in the spring of that year, 39033 he became Vice President of the Company and took on additional general supervisory and executive duties which brought him into general contact with and supervision over manufacturing, sales and marketing policies of the Company. His services and duties as above outlined have continued, except for the N.R.A. Code matters which terminated in 1935, up to the present time. In connection with his duties he acquired first-hand knowledge of the matters hereinafter set forth, and all statements hereinafter made are not dependent upon hearsay but upon his firsthand experience and contacts.

2A. That in the spring of 1933 the officers and executives of Marquette became aware that a Code of Fair Competition under the National Recovery Act was being formulated by the industry, and they had had no part in the formulation of such Code, which in their opinion might seriously and adversely affect the best interests of Marquette. They were advised that this work was being carried on through an organization known as The Cement Institute, now a Respondent in the above-entitled proceeding, and that various members of the industry were joining The Cement Institute for the purpose of taking part in the formulation of the Code, and, therefore, in order to protect the interests of Marquette, the officers and executives of Marquette considered a mimeographed circular letter from The Cement Institute, dated May 29, 1933, and

therewith enclosed the draft of Articles of Associa-
39034 tion of the said Institute relating to the purposes and the power and authority of the officers thereof, copies thereof being hereto attached and identified as Respondent Marquette's Exhibits 1 and 2, respectively. (Received in evidence as Respondents' Exhibits 2988 and 2989-A to H.) At this time the said D. S. Colburn was assistant to the President of Marquette and was requested and directed by the President, Theodore Dickinson (deceased), to assume supervision and direction over Marquette's part in the formulation of a Code of Fair Competition for the Portland Cement Industry; that in accordance therewith, on the 15th day of June, 1933, a telegram was sent by and on behalf of Marquette to The Cement Institute, to George E. Coffin, applying for membership in the Institute, subject to the approval of the Articles of Association and Code, copy of said telegram being set forth in Commission's Exhibit 2603-A to F, inclusive (R. P. 16977, 16978), and that at time of the sending of the said telegram the Articles of Association referred to were as set forth in Respondent Marquette's Exhibit 2. (Received in evidence as Respondents' Exhibit 2989-A to H, hereto attached.)

3. Marquette has generally sold its cement at destination prices. It has not received generally any requests to sell otherwise except from the United States Government from time to time, but by reason of land grant rates or savings that might be made by water delivery, invita-
tions have come to Marquette to bid f.o.b. mill or so
39035 as to give the Government the benefit of such savings, and it has made it a rule, and Marquette's policy has been to sell the Government as requested at all times up to the filing of the complaint herein.

4. At no time during the period subsequent to 1932, from which time D. S. Colburn was in position to know its policies, have there been any particular locations, whether shipping points or otherwise, that have been arbitrarily determined, or agreed upon, by Marquette or by Marquette and any other person, firm or corporation, as points upon which prices for Portland cement would be based at any time or for any particular length of time; and Marquette has at all times during this period been free to make any price for, and sell cement in, any manner which it has chosen; and it has so acted.

5. Marquette has not at any time since 1932 requested the withdrawal of, nor has it since that time withdrawn, any bid which it has made to the Federal Government.

6. At no time within the period during which D. S. Colburn has served Marquette in an executive capacity has Marquette or any of its authorized officers or agents engaged in any combination or entered into any agreement with any person, firm or corporation, whereby it has thwarted or made any efforts tending to thwart the efforts of the United States Government officials to secure f.o.b. mill prices on cement at any time, but, on the contrary, Marquette, its officers and agents have at all times up to the filing of the complaint herein cooperated
39636 with and aided the agents of the Government of the United States in obtaining the maximum benefits to be derived from f.o.b. mill prices by the Government of the United States.

7. Marquette never at any time entered into any combination, agreement, conspiracy or arrangement directly or indirectly with any other person, firm or corporation for the adoption, retention or establishment of any provision in the so-called N.R.A. Code for the Portland Cement Industry or any other agreement or plan established or requiring or arranging in any manner for the division of customers or purchasers of Portland cement into arbitrary classes or in classes dividing such customers into those who were to be sold Portland cement directly and those to whom cement producers would be prohibited from selling directly.

8. Marquette at no time was a party to any combination, agreement or arrangement leading to the adoption, or establishment of any Code provision of the so-called N.R.A. Code of Fair Competition for the Portland Cement Industry, or any other plan or agreement, for the division of or allocation of orders or sales of cement between Marquette and any other person, firm or corporation competing with it in commerce, but, on the contrary, Marquette through its servants and agents and attorneys actively opposed any such arrangement when the same was proposed in 1933 and continued at all times to
39637 oppose it, and no such practice, plan, combination or agreement in which Marquette was ever involved ever came into being.

9. Marquette has not at any time engaged in selling

any cement at or near any seaboard center in competition with cement imported from any foreign country.

10. Marquette remained a member of the Institute from the summer of 1933 to the 22nd day of April, 1935, at which time it resigned, as is shown by Respondents' Exhibit 93.

11. During the Code period Marquette furnished to the Institute such statistical information as it was required to furnish, but shortly after the termination of the Code, and when its officers and executives concluded in 1936 that there was no immediate likelihood of the adoption of a new form of N.R.A. or a code similar to the N.R.A. Code for the Portland Cement Industry, in accordance with the policies which it had theretofore followed in the matter of keeping confidential the details of its business, it refused to send to the Institute any further statistical information, as shown by Respondents' Exhibits 89 and 90 and Commission's Exhibit 1025 (R. P. 16823), and refused to pay any further dues to the Institute based upon the number of barrels of Portland cement which it had shipped, as shown by Respondents' Exhibit 90; but offered to entertain a suggestion to pay dues upon some other equitable basis, since which time it never did receive any statement for dues based upon its shipments nor any proposition from the Institute relating to paying dues on some other basis as requested. Further relating to the matter of statistics, it appearing to the officers and executives of Marquette that if it continued to furnish statistics as requested of it to the United States Bureau of Mines, and the United States Bureau of Mines continued to publish information relating to statistics of the industry as it had theretofore done, by simple arithmetic the amount of Marquette's shipments would be disclosed to its competitors, it was concluded by its executives that it was the better policy to refuse to furnish such statistical information to the Bureau of Mines, and accordingly it did so refuse, as shown by Commission's Exhibit 2908 (R. P. 17469, 470, 473, 474).

12. At no time did The Cement Institute in any manner influence or control Marquette's sales, pricing or general marketing or manufacturing policies, directly or indirectly

Dealer Organization and Outlet.

13. During all the time that D. S. Colburn has been connected with Marquette, since August, 1924, the main outlet for its products has been through retail dealers. During this period by far the greatest part of its entire output has been marketed, year by year, through retail dealers, who have formed an essential means of marketing and distributing its product, stimulating the use thereof in competition with other articles of trade that might in many instances have been otherwise substituted
39039 therefor, thus increasing the general sales of Portland cement, and particularly of the product of Marquette, assuming the burden of local credits, thus reducing the business risk and decreasing the amount of working capital required by Marquette in the operation of its business, and at all times until December, 1939, relieving Marquette from the necessity of tying up large sums in working capital through the prepayment of freight on shipments of Portland cement sold at various destination points where it was to be used or stored for re-sale.

14. That on December 27, 1939, Marquette's field representatives and salesmen reported to its main office in Chicago that they had run across announcements in the field made by competitors that such competitors would immediately begin to sell cement delivered to its customers' destinations, prepaying freight on all shipments thereof; that this was verified by inquiries and reports made at various points in its marketing area; that Marquette's chief officers and executives discussed the effect of such announcements by competitors of Marquette, and concluded that such prepayment of freight would relieve dealers from the necessity of tying up working capital and would be very attractive to them and would result in loss of business to Marquette and would put its dealers at a very serious disadvantage in competition with dealers mar-
keting other brands of cement in competition with
39040 Marquette cement, and, therefore, in accordance with its usual custom of protecting its dealers, Marquette did, on December 30, 1939, send out to all dealers in its trade area a postal card announcing that since it had come to its attention that dealers and other cement buyers in its territory had been notified that competitors from and after December 27, 1939, would prepay freight on all

shipments of cement, Marquette assured its customers that it would do likewise; that one of such postal cards is hereto attached, marked for identification Respondent Marquette's Exhibit 3. (Received in evidence as Respondents' Exhibit 2990.)

15. The said D. S. Colburn has read portions of the record of the proceedings herein relating to the publication by Lehigh Portland Cement Company of certain dealer policies in 1930; knows of his own knowledge that Marquette did not at any time favor such plan of rewarding dealers at so much per barrel of sales at the end of the year, as announced by Lehigh, but that Marquette deemed it of importance to send some communication to its dealers at that time, and accordingly it did on or about November 18, 1930, send to all dealers in the territory in which it marketed its product, a circular letter relating to Marquette continuing its policy of affording its dealers full protection, the same as is hereto attached as Respondents Marquette's Exhibit 4. (Received in evidence as Respondents' Exhibit 2991.)

39041 — Meetings Testified to by Witness Cree.

16. D. S. Colburn has read the testimony of Witness Cree relating to various meetings at which he, Colburn, or some so-called representative of Marquette is alleged to have been present. At no time was an officer or agent of Marquette authorized to attend any such meeting as mentioned by the said Witness Cree or to enter into or make any agreement of any kind, directly or indirectly, with the said Cree or any other representative of the Aetna Company or any other company represented or said to have been represented by the said Cree at any such meeting. At no time during the time that D. S. Colburn has been connected with Marquette since August, 1924, has Marquette actively competed for business or sold Portland cement in the State of Michigan, with the possible exception of some small amount in some very rare instance where it was required by some old customer of Marquette. Said D. S. Colburn has examined Commission's Exhibit 2202, purporting to be a trucking plan for the State of Michigan. Marquette was in no wise interested in that plan or any other similar plan, either directly or indirectly. Except as to one particular occasion mentioned

by Witness Cree, as hereinafter more specifically referred to, it is the best recollection of D. S. Colburn that he was not present at any of the meetings referred to by the Witness Cree in his testimony in this proceeding. With relation to the so-called meeting in December, 1935,
39042 where Mr. Johnson, formerly President of Aetna Portland Cement Company, is described as reading aloud a statement of Aetna's policies, the said Colburn recalls that the Witness Johnson came to the office of Marquette, during December, 1935, in a period when there was a meeting of the Portland Cement Association going on in Chicago and at that time invited Colburn to call upon him at his hotel where he said he was going to have a small group of people get together for a little social gathering in his room, and in response to this invitation D. S. Colburn did call at Mr. Johnson's room, where he saw a number of other people, remembering only by name the witnesses Johnson, Cree, and Mr. Lingeman, but recalling that others were known to him and were in the cement business but not remembering their names; he did not on this occasion hear the Witness Johnson read any statement of policy, but at the time when he came in the Witness Johnson was haranguing Mr. Cree and Mr. Lingeman about Aetna's unprofitable investments in warehouses which Lingeman and Cree were said to have established; and he, Colburn, was not interested, considered this matter none of his business, stayed only a few minutes and left.

17. D. S. Colburn has examined the complaint in the above-entitled cause, particularly the portion thereof describing certain identical bids made to the U. S. Government, and is familiar with the two, and two only, of such bids in which Marquette took part, one being the
39043 Fort Peck bid of June 5, 1934 (See Commission's Exhibit No. 166; R. P. 1518, 1527, 1633, 1642, 1643, 1644, 1646, 21504, 21968), and the other being a bid of September 3, 1935, Mississippi River, Greenville, Miss. (See Commission's Exhibit 171-A through C (R. P. 1537, 1538, 1540, 1543, 4756, 36326)). In addition to these two instances Marquette did bid on one other Fort Peck invitation (See Commission's Exhibit 165, R. P. 1515, 1517, 1632, 1634, 1766, 1816, letting of May 10, 1934). The price bid by Marquette on the Fort Peck letting of June 5, 1934, was made to meet a price previously filed by a competitor with the Code Authority of the Portland Cement Industry, of which

Marquette was notified by a telegram signed by B. H. Rader, Chairman, Code Authority (See Commission's Exhibit 164-J, R. P. 1509, 1518, 1650, 22145), dated May 31, 1934. On the Fort Peck bid of May 10, 1934, the price which Marquette bid was to meet a price previously filed by a competitor with the Code Authority of the Portland Cement Industry of which Marquette was informed by a telegram addressed to it signed by G. H. Reiter, Secretary, Code Authority, dated the 3rd day of May, 1934, as shown by Commission's Exhibit 164-E (R. P. 1509, 1513, 1514, 1518, 1650, 22145). The other instances where Marquette is charged with identical bidding was a bid for delivery at Greenville, Miss., as shown by Commission's Exhibits 171-A, B, C (R. P. 1537, 1538, 1540, 1543, 1756, 36326), dated September 3, 1935. This was during a period im-
mediately following the discontinuance of the Code
39044 of Fair Competition theretofore established for the Portland Cement Industry, during which period there was a continuation of price filing. The price bid by Marquette was one made to meet a price previously filed by a competitor with the so-called Trade Practice Committee which carried on for a short time following the discontinuance of the N. R. A. Code the activities theretofore carried on by the Code Authority, and Marquette received information concerning this destination cost price by means of a telegram dated the 27th day of August, 1935, addressed to it and signed, "Chairman, Trade Practice Committee," a copy of which, exactly as the same was filed in the files of Marquette where it remained until subsequent to the filing of the complaint herein, is hereto attached, identified as Respondent Marquette's Exhibit 5 (Received in evidence as Respondents' Exhibit No. 2992).

18. The invitation to bid, in response to which Marquette did bid the destination price as above set forth, has been received in evidence as Commission's Exhibit 171-D to L, inclusive (R. P. 1537, 1538, 1540, 1543, 1756, 36326).

19. In addition to the foregoing bids D. S. Colburn's attention has been called to Commission's Exhibit 193 (R. P. 1628, 1629), which purports to be abstract of bids, June 4, 1934, bids received by U. S. Engineer's Office, Chicago, Ill., Destination, Chicago. D. S. Colburn has made an ex-
amination of the file of Marquette, and has found
39045 therein Marquette's file relating to this bid, consist-
ing of a letter of transmittal dated June 2, 1934,

copy of the contract, invitation, and conditions, which are hereto attached and identified as Respondent Marquette's Exhibit 6-A, B, C, D, E, F, and G." (Received in evidence as Respondents' Exhibit 2993-A to M, inclusive); that the price bid by Marquette as shown in said contract was a price made by it to meet a price theretofore filed by a competitor with the Code Authority of the Code of Fair Competition of the Portland Cement Industry, and communicated to Marquette in writing as shown by a circular letter dated May 29, 1934, and signed G. H. Reiter, Secretary, which is hereto attached, marked for identification Respondent Marquette's Exhibit 7. (Received in evidence as Respondents' Exhibit 2994.)

20. That with reference to Commission's Exhibit 793 (R. P. 3543, 22065), a response to a proposal for bids to be opened June 28, 1934, D. S. Colburn has examined the files of Marquette with reference to Marquette's connection with this letting, and bid made thereon, and that said file consisting of carbon copies of letters of transmittal and certification dated June 27, 1934, the form of invitation, specifications and contract, as hereto attached, being identified as Respondent Marquette's Exhibits 8-A, B, C, D, E, F, G, H, I, J; inclusive. (Received in evidence as Respondents' Exhibit 2995-A to S, inclusive.)

39046. Method of Making Prices.

21. Within the knowledge of D. S. Colburn since he has been an executive of the Marquette Cement Manufacturing Company, that is, from the beginning of 1933 up to the time of the filing of the complaint herein, it was the policy of Marquette to determine its prices from the standpoint of demand for its product in its various marketing areas, with due regard to the amount it believed its customers would be willing to pay when its sales efforts were aided by the persuasive ability of its salesmen and also with due regard to the prices it would have to receive in order to pay for the operation of its business, and if possible to end the year not with a loss, but with a profit; that during all this period it was Marquette's policy to maintain independence in its pricing and marketing of its product, and to refrain from collaboration or agreement with its competitors.

22. D. S. Colburn has read the testimony set forth in

the record of the proceedings herein of various witnesses who have testified as to the pricing policy and methods of Marquette, including:

Witness Royal (a witness called on behalf of the Commission) at record page 12393, wherein he testified that he had been told by Mr. Tyler, President of Dewey Portland Cement Company, in substance, "that the Marquette Company was known as a price cutter."

39047 Witness Horner (a witness called on behalf of the Commission), at record page 12413, President of Kosmos Portland Cement Company, in substance that Marquette was reaching out pretty well in all directions for more tonnage and probably was cutting prices.

Witness Capen (a witness called on behalf of the Commission), at record page 12703, testimony relating to Commission's Exhibit 2184 (Record pages 12395, 97; 12502, 10; 11; 12703) a letter of the Witness Capen to Mr. Tyler, President of the Dewey Company relating to the statement that Marquette was making deals of about 10 cents off to practically all lime-yard companies, and that he would say that Marquette was underselling the market price.

Witness Affleck (a witness called on behalf of the Commission), at record page 13047, to the effect that Marquette was among the most aggressive and active and destructive of the competitors of Universal Atlas from the standpoint of getting business away from it.

Witness Tyler (witness called on behalf of the Commission), at record 14343, President of Dewey testified in substance that everybody was saying that Marquette was noted in the trade for making price cuts, and again

Witness Royal (a witness called on behalf of the Commission) at record 19640, that Mr. Condon, an official of the Hawkeye Portland Cement Company had re-

39048 ferred to Marquette as a price cutter.

Witness Coogan (a witness called on behalf of Respondent Alpha Portland Cement Company) at record 24587-8, testified in substance that his company had found the mill with a plant at Cape Girardeau (meaning thereby Marquette) making low prices in the field served by the Alpha-Missouri mill, and that he found that Alpha's prices were higher than those being quoted by this company (Marquette), and at record 24595 in substance that Alpha had found Marquette quoting lower prices at various destinations than Alpha was quoting; that since 1932 accord-

ing to field reports, Alpha had found lower prices at some destinations than Alpha had quoted; that this was true in the case of Marquette more than with other companies.

Witness Fellows (a witness called on behalf of Respondent Alpha Portland Cement Company) at record 25869, testified in substance that it was common knowledge in the industry that Marquette was pursuing the policy of cutting prices, and that the company with which Mr. Fellows was connected had always found competition from Marquette.

Witness Koch (a witness called on behalf of Respondent Lone Star Portland Cement Company) at record 32763, Vice President of Lone Star, in substance that prior to 1937 (the time of the filing of the complaint herein) there never was a time when many buyers of Portland cement could not buy Portland cement below the published or quoted prices, except perhaps for a short period during the N. R. A., and not even 100 percent during that period.

33. That the said statements made by the aforesaid witnesses are in substance and fact true, and that the independence of Marquette in its activities has fairly earned the reputation attributed to it; that Marquette has on two or three occasions in eight years last past undertaken to lead in raising prices when it believed such prices were so low that it was not possible for it to make a reasonable return upon its investment, and its manufacturing and selling operations; that in 1932 and 1933 when it sent out its dealer trade announcements raising its prior quotations of delivered prices, such announcements were made only after Marquette had sold all of the cement that it could possibly manufacture and deliver during the two years in question; that on or about May 8, 1937, Marquette, acting on its own behalf, independently and without any agreement or combination with any other person, firm or corporation, mailed out quotations dated May 10, to become effective May 17, increasing its delivered prices at various destinations; that D. S. Colburn has read the testimony of Coogan, a witness called on behalf of the Respondent Alpha Portland Cement Company at record 24641, stating in substance that Alpha Company did not follow the advance quoted by Marquette; that the advance referred to was the quotation sent out by Marquette in May, 1937; that Marquette found its nearby competitors did not follow such advance, and it there-

fore was compelled within a few days to mail our further quotations reducing its delivered prices to the level at which it had quoted prior to the notice dated May 10; that the attempted advance in May, 1937, was due to increased manufacturing costs and expenses unavoidably incurred by Marquette due to increased wages, increase in fuel prices and other elements of cost.

24. Marquette Cement Manufacturing Company was not at any time a member of any of the following:

Association of Licensed Cement Manufacturers.
Cement Manufacturers Protective Association.
Association of American Portland Cement Manufacturers.

It has not been a defendant, respondent, or any party to any action or proceeding brought by the U. S. Government or any Federal Department or Commission charging it with any violation of any of the anti-trust laws or other statutes of the United States or any act of unfair competition or unfair practice of any kind in trade or commerce, save and except such charges as were made against it for violations of the Code of Fair Competition of the Cement Industry under the National Recovery Act, wherein, for example, it was charged that it had varied the terms of a contract furnishing cement for us in building roads in the State of Mississippi at a lesser price than provided in the original contract, because it had given the purchaser the benefit of a saving made in freight rates through the discontinuance of emergency freight surcharges, and save and except as it has been made a respondent to this cause.

25. Marquette has not at any time since 1932, during which time D. S. Colburn has been an executive of Marquette and in position to know and to be familiar with its manufacturing and marketing policies, and its contractual agreements and obligations, agreed with, combined with, or in any manner, directly or indirectly, collaborated with any other manufacturer, dealer or representative of any manufacturer or dealer manufacturing or selling Portland cement for the purpose or with the intent of hindering, lessening, restraining or restricting in any manner competition between Marquette and any competitor as to the price of Portland cement or any marketing practices relating to or affecting the price of Portland cement; nor has it, or has any authorized agent for or on its

behalf, within that period of time, entered into or been a party to any mutual understanding or agreement to employ any particular method or practice for the purpose of or in aid of hindering, lessening, restraining or restricting competition in price between Marquette and any competitor, in the business of manufacturing and marketing Portland cement, and especially in cooperatively or otherwise employing the "multiple basing point system of pricing,"
or any means to bring about the limitation or re-
39052 striction of the sale of Portland cement only at
delivered prices, nor has Marquette during that period of time entered into any mutual understanding or agreement whatsoever with any competing manufacturer or marketer of Portland cement or any other person, firm or corporation, in any manner restricting Marquette or any other person, firm or corporation in pricing, marketing, or distributing Portland cement. On the contrary, Marquette and the officers and executives thereof in charge of and responsible for its marketing and sales policies, have acted independently, deciding and acting upon the matter of prices, the sale and distribution of Portland cement, only in accordance with the individual and collective judgment of such officers and executives, as to what in their opinion was for the best interest of Marquette and its customers, and in so doing Marquette has freely quoted and sold at f.o.b. mill prices to the United States Government, for more than ten years last past; has raised or lowered prices independently of its competitors, and its prices have not been identical with those of its competitors in its marketing area, save and except as it has met the prices which it has found its competitors quoting in any field where its competitors have had an advantage over it in the cost of delivering their product to the destination where it was offered for sale, sold and delivered, or save and except where its competitors have met the prices made by Marquette in the portion of its marketing area
where it has enjoyed an advantage over its competi-
39053 tors in the cost of transporting its product to the
several points where it was offered for sale, sold and delivered.

39054 Mr. Wooden: Paragraph 13, in full, objected to
as immaterial and argumentative, and the portion
39055 of it that begins "At all times until December,
1939," is objected to as irrelevant and as going into

a matter subsequent to the issuance of the complaint.

38959 Trial Examiner Norwood: I will sustain the objection so far as it relates to any matter subsequent to the complaint, unless that matter is directed to meet some evidence of continuance.

Mr. Zimmerman: It is exactly the purpose of this. You see, they charge here certain combinations with reference to dealer policies. In order to combat that, I go back to 1939 and show one of our policy announcements. Then there is this announcement, which follows there.

Trial Examiner Norwood: Well, we shall receive that subject to study.

Mr. Wooden: Paragraph 14 is objected to as irrelevant and immaterial on the same ground as being a new practice subsequent to the complaint.

Trial Examiner Norwood: The objection is sustained on that one.

38969 Trial Examiner Norwood: I sustain the objection. That remains there as an offer of proof.

Mr. Zimmerman: Just what is Your Honor sustaining the objection to?

Trial Examiner Norwood: Paragraph 14.

38974 Trial Examiner Norwood: Now, if Counsel is through making his statements, I will rule on the entire stipulation, and I have studied it on the record and will cite the record.

38975 Page 38939, running over on page 38940, strike all of paragraph (24). This matter was subsequent to the complaint.

38976 Mr. William R. Blair is on the stand.

Direct Examination (continued) By Mr. Withrow

39077 Q. Mr. Blair, yesterday, on record page 38914-915; the Examiner asked you some questions about what the buyer paid when he came to El Paso; an Arizona dealer, for instance, came to El Paso for truck delivery. Would you tell us what he pays to you?

A. He pays the destination price, from which we deduct the rail freight rate.

Mr. Withrow: On the basis of the witness' statement, I re-offer in evidence Respondents' Exhibits 2974, 2975, and 2976, it being the contention of the Respondents that

such a price is a mill price and not a delivered price (handing the documents to Mr. Wooden).

Mr. Wooden: May I ask the witness a question in that connection?

Trial Examiner Norwood: Certainly.

Mr. Wooden: Will you read the last question and the answer which just preceded the offer?

(Question and answer read.)

Examination on Voir Dire by Mr. Wooden.

Q. Do you mean that will apply to the Arizona dealer?

A. All dealers who take deliveries at the plant.

Q. Do you have Arizona dealers who come and buy that way?

A. Through commercial trucks, I believe I testified yesterday; most of the shipments to Arizona are
39078 through commercial truck lines.

Q. How long have you been doing that?

A. For a number of years.

Q. And I understand— How many years?

A. I cannot tell. The price lists are in evidence; as I recall, those are all stated—the price lists have been, I believe, introduced in evidence when you were taking testimony in Los Angeles, and will show for how long it has been done. Those price lists contain both rail and truck delivered prices.

Q. Has that been confined to your Arizona dealers?

A. No; what other deliveries we have made have been made in the same manner.

Q. Well, have other delieveries of that sort been made in connection with sales to dealers other than in Arizona?

A. Yes.

Q. Texas, as well?

A. Texas, as well. That letter that was introduced yesterday discouraging that practice, you see, shows that that was done all through the depression.

Mr. Wooden: I still object, Your Honor, to these exhibits, because they have no relation to the amount of sales that are made in the way the witness has testified about. It is simply a total of the amount sold for delivery by trucks and the amount sold delivered by railroads. It does not go to the point of the witness'
39079 testimony.

Mr. Withrow: Well, the testimony of the witness

was that all sales for truck delivery were made in that way, so I do not quite catch the basis of Mr. Wooden's objections.

However, we rest on the record, and what the record shows.

Mr. Wooden: I did not understand him to say that all sales were made that way.

Mr. Withrow: Well, you asked him and got the answer.

Trial Examiner Norwood: The objection is overruled. I will receive the exhibits.

(RESP. EXS. 2974, 2975, and 2976, were offered and received in evidence).

39080 Mr. Withrow: I now offer to prove through the testimony of Mr. Blair that the Southwestern Company at El Paso has delivered to customers' trucks whenever they have requested truck delivery; that customers have not frequently demanded the privilege of buying at the point of production and delivering to destination by truck.

In addition, I offer to prove that this mill discourages deliveries to customers' trucks at its loading platform because the danger involved in such delivery is great, because the physical set-up at the mill precludes efficient and safe delivery in this manner; that deliveries to customers' trucks at the mill gives rise to the problem in connection with credit, and that some customers or dealers arrive at the mill with trucks and demand that the trucks be loaded and cement sold to them on credit; in some instances the El Paso mill is unable to check 39081 credit of the particular customer demanding this service, and the burden of these requests falls on the El Paso mill and would be severe if more customers should request truck delivery.

I further offer to show that most El Paso customers have stated that they are opposed to the practice of truck delivery, and that deliveries to trucks or customers having a regular place of business in the State of Texas are limited in view of the Texas load laws, which permit a maximum load of only 7,000 pounds, or translated into terms of barrels, 171 barrels of cement at one time, a minimum carload of cement being 132 barrels and going up to a much larger capacity, in some instances 300-barrel cars or more.

I further offer to prove that loading of trucks at the El

Paso mill is more expensive than the loading of railroad freight cars; that the expense of keeping a separate crew available for the purpose of loading trucks at the El Paso mill would be prohibitive from the point of view of cost in view of the small demands for truck delivery.

I offer to show through oral testimony based on Respondents' Exhibits 2971, 2972, and 2973, which were excluded by Your Honor, that the physical situation at this mill prohibits the efficient and economic loading of
39082 trucks, and that trucks cannot be loaded at the mill at the same time that rail freight cars are being loaded because existing facilities,—including packing machines, loading platforms, and the personnel,—are unable so to do.

I further offer to prove that there are no savings in costs to be passed on by the Southwestern Company as the result of delivering by truck as against delivering by rail.

I offer to show through this witness that the trucking of cement is a nuisance to the El Paso mill, but that it continues to make deliveries to customers' trucks at the mill to accommodate local dealers and to meet the competition of Southern California mills with which El Paso competes to the West. Arizona dealers who purchase cement have made a practice of picking up small orders for cement in their trucks or in the trucks of contract trucking companies, and of ordering large quantities delivered by rail.

I further offer to show the El Paso mill has never tried to control the use or route or destination of the cement which it has sold and loaded on a customer's truck at the mill.

Trial Examiner Norwood: I think much of that—there is one new feature there that is very interesting on
39083 the credit checking, and that has not come up.

Did you, Mr. Blair, pay attention to the statement that Counsel has made there?

The Witness: Yes.

Trial Examiner Norwood: Can you testify to the truth of those statements?

The Witness: Yes, sir.

Trial Examiner Norwood: Go ahead.

Mr. Withrow: Off the record. Are you going to refer to this other matter that happened at the end of the hearing?

Trial Examiner Norwood: No. I have not had time to study it.

I think that the record may show that that is this witness' testimony on the matters that you have just stated there.

Mr. Withrow: I would like to note an exception to this procedure.

I think that if we are entitled to ask questions and answers, that the Respondents' Counsel should be afforded the privilege of presenting it in the manner in which they want it in question-and-answer form, and not have to be put to the burden of summarizing, and then enabling it to go in the record by one question and answer by the witness, a "yes" or "no" answer. This accords to Counsel
39084 for the Commission the right to cross-examination.

Either we are entitled to put it in question-and-answer form, or else it is an offer of proof, and no right of cross-examination accrues to an offer of proof.

Mr. Wooden: I object to that method of putting it in, myself, because it enables Counsel to summarize in a form most acceptable to himself what the witness' testimony would be.

I object to the procedure also.

Trial Examiner Norwood: I think there is no prejudice to the Respondent or to the Commission in permitting that statement to go in, and I think you might have included it in your stipulation.

We have covered those points so many times that there is no prejudice and no advantage to you in stringing this out with questions and answers, so I shall let the record stand as it is.

Go ahead.

Mr. Withrow: There was no desire to string it out by questions and answers.

Trial Examiner Norwood: I did not assert any desire. It is necessarily strung out when you bring this out by questions and answers.

Proceed.

I will ask Counsel for the Commission to refer to
39085 the offer of proof on the record, page 39019, and if he can clarify his statement there,—I have not studied this, but it seems to me that some of the proof offered there should be admitted.

We will take that up after lunch.

By Mr. Withrow:

Q. Did the El Paso mill, Mr. Blair, ever file land-grant rates with The Cement Institute?

A. I believe they did at one time.

Q. Would you recall about when this was, and how long it continued?

A. My recollection is it was just during the Code days.

Q. Do you mean during the N.R.A. Code days?

A. That was my impression; yes, sir.

Q. Did you receive schedules of land-grant rates from the Institute?

A. We received a few.

Q. And when bidding on Government invitations involving land-grant rates, did you use the rates calculated in your own office, or the rates distributed by the Institute?

A. My recollection is that we used the lowest land-grant rate compilation that we had available in our office.

Q. And was there any agreement between you and your competitors to use the lowest land-grant rate information?

A. None whatever.

39086 Q. Was there any agreement to use the Institute land-grant rate figures?

A. None whatever.

39087 Q. Now, you testified yesterday with reference to making special prices to the Government on large orders. Have your bids or bids to the Government 39088 on these large orders been discussed at any meetings with competitors or any district meetings of The Cement Institute?

A. Not to my knowledge.

Q. Have you ever had any agreement with any of your competitors with reference to bids on any quantity to State or Federal Government bodies?

A. None whatsoever.

Q. You testified that you bid f.o.b. mill to the Government where land-grant rates were involved. Have you ever so bid to them where land-grant rates were not involved?

A. Yes.

Q. Do you recall an instance?

A. Some bids, several years ago, were made to the Reclamation Service, I believe, f.o.b. our mill, and also bids to the Conchos Dam were made f.o.b. our mill.

Q. Mr. Blair, I show you Respondents' Exhibit 2996-A to K, and ask you to tell us what it is.

A. It is a bid we submitted to the Procurement Division of the Treasury Department for opening 10 a. m., Friday, April 15, 1938.

39089 Q. And that bid, if it had been accepted, could have been used for shipments in Texas where no land-grant rates were involved; is that correct?

A. Yes.

39090 (RESP. EX. 2996-A to 2996-K" was offered and received in evidence.)

Q. Mr. Blair, I direct your attention to the bid, your bid, which is on page K of this exhibit, and I notice here, you have no bid filled in in certain columns. Would you explain to us why you did not bid at El Paso on those requests?

A. We considered those as retail lots which we could not handle to advantage at our plant.

Q. That is less than a hundred barrels?

A. Yes. Well, one here, 100 or more barrels, but the same thing, because it was an indeterminate amount that might be less than a carload, that we could not handle to advantage. It specifically states l.c.l. at the heading of those columns.

Q. Now, it appears from that bid that you bid only for requirements in zone XII-B; that you might have

39091 bid in zone XII-A. Will you tell us why you did not bid for delivery in zone XII-A?

A. I cannot recall unless I go through it. Do you want me to go through this? There was some situation on that. Let me see.

XII-A is designated as northeastern Texas, then in parentheses, north of Austin and east of Abilene, and our mill was not located in that zone.

Q. And are there other mills located within that zone?

A. Yes.

Q. Now, it also appears that you limited your bid to a maximum quantity of 200,000 barrels. Would you tell us your reasons for so limiting your bid?

A. We had other contracts on our books at that time such that we were afraid if we were tendered an offer that we might not be able to fill all of those orders.

Q. Now, did you receive an award on the basis of that bid?

A. No, sir.

Q. Now, have you ever received any similar invitations from the United States Government?

A. As I recall, there was one other bid shortly subsequent to this made up in a little different manner.

39092 Q. Mr. Blair, would you look at Respondents' Exhibit 2997-A to K, and tell us what it is?

A. This was a bid, I referred to a moment ago, for the Treasury Department, Procurement Division, to be opened at 10 a. m., May 26, 1938.

Q. And is that a copy of your bid filled in on that invitation?

A. It is.

(RESP. EX. 2997-A to 2997-K was offered and received in evidence.)

By Mr. Withrow:

Q. Did you receive an award on this—that is, Respondents' Exhibit 2997-A to K, Mr. Blair?

A. No, sir.

Q. Have you received any other inquiries from the Procurement Division other than those last two, where

39093 the Government did not specify the destination where it was going to use the cement?

A. Yes, we have.

Q. Would you tell us whether or not your bid on those other instances?

A. We have, if they were in the territory which we normally serve from El Paso.

Q. Now, you said you did not know the destination. Would you just tell the Examiner how you know what territory they were for?

A. The more recent bids of this nature have come out specifying for use of the various agencies of the Government in, say, the State of Texas, the State of New Mexico, the State of Colorado, and so forth. They have designated them by States.

Q. So that if you got an invitation for the State of Montana, you would not bid? That is outside of your territory?

A. That is correct.

Q. Now, have you ever received an award on the basis of these bids that you made on inquiries where the destination is not stated?

A. We received an award on one or two of those; yes, sir.

Q. And in those instances did you also bid f.o.b. mill, like in these two instances?

A. The same way, yes.

39094 A. No, there is not.

Q. Did you bid to the Bureau of Reclamation on 6,000 barrels of cement for use at Hatch, N. M., the bids to be opened on November 6, 1936? Do you recall?

A. I do not recall offhand. We have bid on a number of inquiries for the Government at Hatch.

Q. Mr. Blair, I show you Respondents' Exhibit 2998-A to I, and ask you to tell us what it is.

A. It is a bid for 6,000 barrels of cement for Hatch, N. M., to be opened at 2 p. m., November 6, 1936.

Q. And is that a copy of the bid that Southwestern made?

A. It is.

Q. And did you bid f.o.b. mill in that instance?

A. No. We bid delivered price—two delivered prices, in fact.

Q. Did you have any special condition in connection with one of those prices?

A. Yes. We bid on 100,000-pound minimum cars, and also on 60,000-pound minimum.

Q. So that you varied your price with the weight?

A. Yes. The hundred thousand pound minimum was lower.

39095 (RESP. EX. 2998-A to 2998-I was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Blair, is there a land-grant rate from El Paso to Hatch, N. M.?

A. No, sir.

Q. Did you receive an award under this bid?

A. I am of the opinion we did. I do not recall from memory.

39097 Q. Mr. Blair, I show you Respondents' Exhibit 3000-A and B, and ask you to tell us what each of them is.

A. 3000-A is a copy of a letter from Mr. Merrill to Mr. Harper, Bureau of Reclamation.

B is the original telegram from Mr. Harper to—

39098 addressed to our company on November 19th with reference to this matter of price.

Q. And does that refresh your recollection that this 2998 A to I is the instance where you did reduce the price 15 cents a barrel (handing the document to the witness)?

A. Yes; that is the transaction.

Examination on Voir Dire by Mr. Wooden.

Q. Referring to Respondents' Exhibit 3000-B, for identification, there are some pencil figures. What are those?

A. Those are in Mr. Merrill's handwriting.

39099 The Witness: I will have to look back on the bid to tell what that is.

(After referring to a document:) I do not know why that deduction of 15 cents from that price was made.

By Mr. Wooden:

Q. Well, there was a reduction in that amount, wasn't there, 15 cents?

A. Oh, yes.

Q. Then is there some freight calculation, or what is it?

A. He has taken from the bid the net that Mr. Harper mentions in his telegram to indicate the freight per barrel.

Q. And the other figures are clear as to what they are?

A. Yes.

39100 (RESP. EX. 3000-A and 3000-B was offered and received in evidence.)

39101 By Mr. Withrow:

Q. Now, is your commercial freight rate, Mr. Blair, if you know, from El Paso to Hatch, N. M., lower than that of other cement mills in the territory to Hatch, N. M.?

A. Yes.

Q. Now, did you bid subsequently to this bid we have just been talking about on cement for use on the Caballo Dam at Hatch, N. M.?

A. Yes.

Q. You just testified that you bid subsequently for the Caballo Dam. Is Respondents' Exhibits 3001-A to C an instance when Southwestern's bid?

39102 A. Yes. This was a bid for opening April 9, 1937, on 8,000 barrels for delivery at Hatch.

(RESP. EX. 3001-A, 3001-B and 3001-C was offered and received in evidence.)

By Mr. Withrow:

Q. I show you Commission's Exhibit 119-B, and will ask you if that is the tabulation covering Respondents' Exhibit 3001.

A. Yes, this is a tabulation covering this bid.

Q. Now, the abstract, Commission's Exhibit 119-B, carries a figure of $2.85 in cloth as your bid price. Is that the price you bid in cloth?

A. $2.84 is the bid as shown here.

39103 Q. Is the bid of $2.84 in cloth as shown on 3001 correct?

A. Yes, sir.

39104 By Mr. Withrow:

Q. Did you make a bid, Mr. Blair, to the Procurement Division for 11,000 barrels, to be opened on December 20, 1938?

Mr. Wooden: Your Honor, that is objected to, unless it goes specifically to something that we put in as a part of a continuing policy or practice. I do not believe it does relate to any such charge in the complaint.

Trial Examiner Norwood: What does it go to?

Mr. Withrow: I believe that Admiral Peoples testified that inquiries were sent for bids for use by any Government department at any point in the State of New Mexico, and that is the inquiry I am now directing my attention to.

39105 Mr. Wooden: When was this?

Trial Examiner Norwood: When was that? What is the date of that?

Mr. Withrow: They have it as December 7, 1938.

Trial Examiner Norwood: 1938, did you say?

Mr. Withrow: Yes; December 7.

Mr. Wooden: Admiral Peoples testified more than 30 days prior to that time.

Trial Examiner Norwood: Was he on after that?

Mr. Withrow: He was on subsequently. He was on four times. And even disregarding that, we are entitled to prove this, because this shows the Southwestern Company bid f.o.b. mill under the same conditions and circumstances which surrounded the Good Friday bids, and the Govern-

ment has attempted to prove a continuation of some agreement or conspiracy not to bid f.o.b. mill.

Trial Examiner Norwood: Well, is that about the same time as the Good Friday bids?

Mr. Wooden: This is subsequent.

Mr. Withrow: This is subsequent to the Good Friday bids.

Trial Examiner Norwood: How much?

Mr. Wooden: Seven or eight months.

Mr. Withrow: Seven or eight months. We put in one bid in between on which they bid f.o.b. mill, and I
39106 propose to show that under inquiries of this type Southwestern Company at El Paso always bid f.o.b. mill.

Trial Examiner Norwood: What is the number of that exhibit?

Mr. Withrow: This is not numbered yet.

I ask to have it marked for identification. It is only three pages.

Trial Examiner Norwood: All right.

The witness identified Resp. Ex. 3002-A to C as a
39107 copy of the bid of Southwestern to be opened December 20th, 1938 for 11,000 barrels of finely ground Portland cement for the use of the Federal Government in the State of New Mexico.

Q. And did you bid f.o.b. mill in that instance?

A. Yes, sir.

Mr. Wooden: Objected to as immaterial.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondents' Exhibit 3002-A to C (handing the document to Commission's Counsel).

Mr. Wooden: Objected to as immaterial.

Trial Examiner Norwood: Objection sustained.

Mr. Wooden: I move that the answer be stricken to the effect that he bid f.o.b. mill.

Trial Examiner Norwood: Motion allowed.

By Mr. Withrow:

Q. Did you receive an award on this bid, Mr. Blair?

Mr. Wooden: Objected to on the same ground.

Trial Examiner Norwood: Objection sustained.

Mr. Withrow: I demand that Counsel for the Commission produce a copy of the abstract or tabulation of bids prepared by the United States Government Procurement Division covering inquiry specification No. 15053-SP-12-20,

issued on December 7, 1938, by the Treasury Department, Procurement Division, for finely ground Portland cement
for use by the executive departments or other estab-
39108 lishments of the Federal Government in the State of New Mexico, bids to be opened on December 20, 1938.

Mr. Wooden: As far as I know, Your Honor, it is my best belief that we do not have in our custody, and never have had in our custody, the documents that Mr. Withrow refers to.

Trial Examiner Norwood: Now, it is very clear there is nothing about this bid in evidence.

Mr. Withrow: And I propose to show, had I been given an opportunity to state, through this tabulation that this is an instance where the Government made an award to the company bidding the highest f.o.b. mill bid, and that all companies which bid f.o.b. mill.

The witness identified Resp. Ex. 3003-A to C as a copy of a Southwestern bid, for opening July 6, 1939.

39109 By Mr. Withrow:

Q: Did you bid f.o.b. mill in that instance?

Mr. Wooden: I object.

Trial Examiner Norwood: Just a minute.

I will ask the Counsel not to—we have just ruled out bids and invitations, and so forth, not related to the Good Friday bids that were subsequent to the complaint, and I will ask the Counsel not to take any more time with any others like that.

Mr. Withrow: In order to protect the record on behalf of the Southwestern Portland Cement Company, it is, I believe, imperative on us to make an effort to prove the number of instances where they have been asked for bids of the type of the Good Friday bid, to prove that this company has bid f.o.b. mill even though the destination was not named, and even though the departments of the Federal Government were not going to use the cement at the destination named, and the reason for doing that is that the Good Friday bids, and other bids, were received in evidence for the purpose of showing the continuation and conspiracy to refuse to bid f.o.b. mill.

It is our contention on behalf of the Southwestern Company that it had never refused to bid f.o.b. mill under circumstances set forth in the Good Friday bids, or when land-grant rates were involved, but that it did bid

39110 f.o.b. mill, and we propose to show, and make every effort to show, because I think it is admissible, even taking the worst possible case against the Respondents, namely, the proof of an agreement to refuse to bid which existed as of the date of the complaint, these Respondents in general, and this Respondent in particular, would be entitled to prove that it discontinued the practice of refusing to bid f.o.b. mill.

So on all these bases it is relevant and material, and if Your Honor is going to rule against me I am going to move again that Commission's Exhibits 1338 and 1339 be stricken from the record at this time, together with all of the oral testimony by Admiral Peoples based on the Good Friday bids.

Trial Examiner Norwood: Now, have you offered this in evidence?

Mr. Withrow: I will offer it in evidence. It is 3003-A to C.

Trial Examiner Norwood: Well—

Mr. Wooden: Objection is made on the same ground as before.

Trial Examiner Norwood: Objection sustained.

We will consider that Counsel has made the motion, and the motion is denied.

39111 Mr. Wooden: I would like to say in this connection that I do not see why it is necessary, in view of Your Honor's numerous rulings on this particular point, why it comes up again and again, when Respondents are entitled to their exceptions on behalf of every other Respondent.

Mr. Withrow: Because the Circuit Court of Appeals of one of the circuits less than two months ago said that the burden was on the Respondents to take that position, and that they should do it, and doing so is not to be considered in any respect delay or contempt of court as long as it was a disagreement on a legal principle, and I think there is a pretty fundamental disagreement here.

We have throughout the Commission's case attempted to restrict proof, to matters before July, 1937, and we took that position throughout. Now, we are attempting to meet the proof they put in.

Trial Examiner Norwood: Now, I think Counsel has a sufficient number here, and I will ask him not to have any more of these marked.

Proceed.

By Mr. Withrow:

Q. Now, Mr. Blair, have you ever bid on cement requirements for the Conchas Dam?

A. Yes, sir.

Q. And do you recall when the first bids for use on the Conchas Dam were opened?

39112 A. No. It seems to me they were along in '35 or '36.

Q. Mr. Blair, I show you Respondents' Exhibit 3004-A to E, and ask you to tell us what it is.

A. It is a bid for 250,000 barrels for the Conchas Dam for opening September 4, 1936.

Q. Is that a copy of the bid which you made?

A. It is.

Q. Now, I notice that towards the end there there is some pencil writing on page 3004-C. Could you tell us whose handwriting that is?

A. That is mine.

Q. And what is it intended to indicate?

A. At the time this bid was made up on September 2, 1936, you will note that under Note 1 on page 3004-C we quoted a deduction in—

Trial Examiner Norwood: Wait a minute. Do not tell what you quoted. Just describe it.

The Witness: It is a freight rate showing 24½ cents, and the pencil figures show 24½, which was a reduc-

39113 tion in freight that occurred later on.

By Mr. Withrow:

Q. And down here, does this word—is it "out" or "amount"—does that modify the bid in any way?

A. The word is "out." That referred to a special type of equipment which they specified in their call for bids, and it was later excluded from their specifications due to the inability to secure that particular type of equipment.

Q. In whose handwriting is this on 3004-E?

A. That is mine.

39114 (RESP. EX. 3004-A to 3004-E was offered and received in evidence.)

39116 By Mr. Withrow:

Q. Would you tell us whether or not the applicable rate to Newkirk, N. M., was in fact reduced subsequent to this bid?

A. I believe before the completion of this contract the rate was reduced, and we reduced the price accordingly.

Q. Now, the invitation called for bids in the alternative f.o.b. shipping point or f.o.b. Newkirk, N. M. Would you tell us your reason for not bidding f.o.b. your shipping point of El Paso?

A. Well, we in effect gave them a bid f.o.b. El Paso. We show in the bid the rate per hundredweight and also the rate per barrel, that they may deduct from this bid price in order to arrive at a price at our mill in case they want to use Government bills of lading.

Q. And was this rate you show the commercial freight rate?

A. Full commercial rate; yes, sir.

Q. Did you receive an award on that letting on the Conchas Dam?

A. We did.

Q. And did you make shipments to the Government on the basis of that award?

A. Yes, sir.

Q. Now, did the Government deduct commercial freight rates and take delivery f.o.b. your mill and ship on Government bills of lading?

39117 A. No, sir.

Q. There is no land grant between El Paso and Newkirk, N. M.?

A. No.

Q. There was a special rate involved, wasn't there?

A. Not in this particular bid. There was later on.

39120 Q. Now, just to make this as short as possible Mr. Blair, I will ask you to look at Commission's Exhibit 177-F, and ask you to tell us if the same reason for not bidding a flat f.o.b. mill price existed in that instance as existed with reference to the invitation you just testified about, that is, Commission's Exhibit 170-A, to previous inquiry for Conchas Dam in 1936.

39121 A. Same reasons applied; yes, sir.

Q. Now, in the second instance, that is, in September 1937, did you receive an award on that inquiry also?

A. Yes, sir.

Q. And did the Government take the cement f.o.b. your mill and ship on Government bills of lading?

39122 A. No, sir; they took delivered price.

The witness identified Resp. Ex. 3005-A to D, as a copy of a bid made by his company.

39123 Q. Mr. Blair, I show you Respondents' Exhibit 3006, and ask you if that is a copy of the tabulation received by you concerning the bids, including your bid, Respondents' Exhibit 3005-A to D.

A. It is.

39125 (RESP. EXS. 3005-A to 3005-D, and 3006 were offered and received in evidence.)

39127 By Mr. Withrow:

Q. Now, were you the low bidder on this invitation covered by the bid in tabulations 3005 and 3006?

39128 A. We were not low on a delivered basis.

By Mr. Withrow:

Q. Did you receive an award on the basis of this proposal?

A. We did.

Q. Were you the low f.o.b. mill bidder?

A. No.

Q. Do I understand your testimony correctly, Mr. Blair, that you were awarded the business although your mill price plus delivery cost to destination was higher than a delivered price quoted by one of your competitors; is that correct?

A. That is correct.

Q. Now, have there been in your territory—that is, the territory where you market cement—any large projects on which quantities of cement comparable to the quantities you bid and shipped onto Conchas Dam, which were financed by private capital and built by private individuals?

A. No, not during my experience with the company.

Q. Well, Mr. Blair, did the El Paso mill submit any bids on cement to be used on the Colorado River

39129 project in Texas, the so-called Hamilton Dam?

A. No, sir.

Q. Would you tell us your reasons for not bidding on that project?

A. It was entirely outside of the territory that we normally serve, and we felt it was absolutely useless to put in a bid or such a project.

39130 Q. And how did your freight rates compare with the freight rates of the other mills in Texas, for example, to the destination?

A. They were materially higher; my impression is that they were at least twice as high as rates of mills in East Texas.

Q. Now, did you enter into any agreement with your competitors to allocate the business, to distribute the business on this Colorado River project?

A. I did not.

Q. Have you ever had any agreement with your competitors to divide up either the business or the territory between yourself and your competitors?

A. None at all.

Q. I show you Commission's Exhibit 1950. Did you ever see this document prior to its introduction in this case?

A. No, sir.

Q. Now, you said you did not bid on this Colorado River project in Texas. Did you make any shipments on that?

A. No, sir.

39131 Q. Now, within the territory in the United States where you market cement from the El Paso mill, do you come into competition with imported cement?

A. In a slight degree, yes.

Q. And when you do come into contact with this foreign cement, from what country is it imported?

A. From the Republic of Mexico.

Q. And does this come in in any great volume?

A. No. Usually in truck loads, although there have been a few carloads shipped into El Paso.

Q. Have you taken any steps to oppose the importation of this cement around El Paso?

A. Yes, we have tried to discourage its use by persuasive measures with customers who have used it, and we have been successful in some cases and unsuccessful in others.

39132 Q. Well, now, these persuasive efforts that you have made, Mr. Blair, were they made in cooperation with any of your competitors?

A. No, sir.

Q. Were they made as the result of any agreement with your competitors?

A. None whatever.

39133 Q. Were these persuasive methods merely the efforts of your own individual company?

A. Yes; and in certain cases my own sand.

Q. Did you boycott dealers who bought Mexican cement and used it in El Paso?

A. We did not even threaten boycott with any of the dealers.

By Mr. Withrow:

Q. Now, Mr. Blair, have you ever conferred with contractors who were thinking of using Mexican cement on the question of using this Mexican cement?

39134 A. We have.

Q. Now, did you deal with this question of contractors in Mexican cement in the same way as you did with the dealers that you just testified about?

A. A little bit different. We went a little bit further with the contractors, tried to show them where it was to their advantage to use our cement.

Q. Now, I show you Commission's Exhibit 1275. Is the action which you have just been describing with reference to foreign cement the matters which you intended to discuss in that letter?

A. This is one of the incidents that I had in mind.

39136 Q. Have you ever compiled a list of dealers or contractors who handle Mexican cement?

A. No.

Q. Have you ever refused to sell your cement to a dealer because he bought or sold Mexican cement?

A. No.

Q. Have you ever refused to sell to a contractor who used Mexican cement?

A. No.

Q. Have you taken any steps to coerce either dealers or contractors to get them to abandon the use of foreign cement?

A. No.

Q. Now, have you ever resorted to espionage upon dealers who handled Mexican cement?

A. No, sir.

39137 Q. Have you made any concerted or uniform deviations from the prices, your normal commercial prices at El Paso, in order to drive Mexican cement out of the El Paso market?

A. No, sir.

Q. Have you taken any steps to prevent genuine price

competition which might have resulted from the importation of Mexican cement in El Paso?

39138 A. No, sir.

Q. Mr. Blair, did you ever secure from your Los Angeles office any information as to the steps taken by your company with reference to foreign cement in Southern California?

A. I have discussed the matter with them a few times, and I remember one time getting a memorandum regarding that, but I did not keep a copy of it.

Q. Do you remember the circumstances under which you got that information, and from whom you got it?

A. Yes, it was in connection with a request from some of the lumber dealers in Texas, and I think it particularly related to the situation at Corpus Christi, Texas.

Q. And do you normally sell cement in the Corpus Christi market?

A. We haven't since the change in freight rate structure back in 1927, I believe it was.

Q. And would you tell us your reasons for securing this information for the dealers in Corpus Christi?

A. Well, the man who, as I recall, was one of the leaders in making the request at one time had been our customer

39139 in Corpus Christi when we were able to ship into that market, and as a matter of courtesy to him I endeavored to secure the information for him, although we at that time were not at all interested in that market.

Q. And after you obtained this information and passed it along, did you ever act on the information in any way?

A. I never had any action to take. I kept no copy, and I do not even recall what was in the memorandum.

Q. And do you know what this dealer in Corpus Christi did with the information?

A. No, sir.

Q. Mr. Blair, I show you Commission's Exhibit 1275-A to D, and direct your attention specifically to the third paragraph, the matters you have just been testifying about; is that the matter referred to in the third paragraph?

A. It is.

Q. And I show you Commission's Exhibit 1275-I to J, and I will ask you what the source of your information was with reference to the second paragraph in that letter?

A. I think Mr. Brazelton told me regarding that that he was going to Corpus Christi on this situation.

Q. And was he also the source of the information
39140 in the next paragrah, that is the third paragraph?

A. Yes. He told me that.

Q. Was he also the source of the information contained in the fifth paragraph?

A. That and the meeting that I attended at Waco a short time prior to this time at which I was asked to secure the information that has been mentioned in these documents.

Q. Mr. Blair, when did the El Paso mill join The Cement Institute?

A. I believe it was in 1933.

Q. And could you tell us the reasons why the El Paso mill joined at that time?

A. No, I cannot. I think it was in connection with the proposed Code that we felt like it would be a vehicle to handle the Code matters.

Q. Now, are you still a member of The Cement Institute?

A. No, sir.

Q. Have you ever held any office in the Institute?

A. Yes, sir.

Q. What office was that?

A. I was trustee for District 9.

Q. And District 9 covered Texas?

A. That is correct.

Q. And you remember approximately when you became trustee of District 9?

39141 A. It was early in 1936, I believe it was. I think it was either January or February.

Q. Now, have you ever served on any committee of The Cement Institute?

A. No, sir.

Q. Have you ever attended any meeting of the Institute?

A. I attended one that I can remember. I may have attended two.

Q. At the meeting or meetings which you attended, did you, or was any agreement entered into so far as you know with reference to the marketing or pricing policies to be followed by members of The Cement Institute?

A. No, sir.

Q. Was there any agreement at those meetings entered into with reference to trucking or foreign cement questions?

A. No, sir.

Q. Was any attempt made at the meetings which you attended to induce or compel you to adopt policies uniform with your competitors?

A. None directed towards me.

Q. Did you know of any directed towards anybody else?

A. No, sir.

Q. Now, when you were a trustee did you correspond with Mr. Merrill regarding The Cement Institute?

A. I did a few times; not very often.

39142 Q. Now, I believe you said you attended one and maybe two meetings in the Institute while you were district trustee. Were those all of the meetings held during that period?

A. Oh, no. There were numerous other meetings that I did not attend.

Q. Now, when you found that you were not going to attend a meeting of the Institute, did you request anyone to attend as a substitute for you?

A. Yes. I usually took it up with the Los Angeles office, and since Mr. Warren at our Ohio plant was so much nearer, several times I requested him to act for me, and one or two times I think Mr. Powell, the president of the company, was attending a meeting and he acted as trustee in my stead.

Q. And if you were trustee for District 9, would you tell us your reasons for not attending all the Institute meetings and board of trustees?

A. Well, in the agenda that usually came out ahead of these meetings, I could see that there was nothing of any particular importance for the mills in District 9, and it took so much of my time and so much of the company's expense that when Mr. Warren was an overnight distance from a place of meeting it was just a matter of economy of both time and money for him to attend.

Q. Now, before you attended these meetings, did you request Mr. Merrill for permission or for advice with

39143 regard to attending them?

A. I did on one or two occasions, yes.

Q. When a meeting was about to be held of The Cement Institute which you did not think would have any matters concerning the mills in District 9, was it your practice to so advise Mr. Merrill?

A. I usually did as a matter of form, and asked him if

Mr. Warren was going to be there, so that he might represent us as a matter of form.

Q. And what attitude or what instructions did Mr. Merrill give you with reference to Southwestern's interest in the continuation of The Cement Institute?

A. Well, he has only written me regarding that I think maybe once or twice since we have been members of the Institute.

Q. Do you recall any statements that he made after the N. R. A. with reference to the continuation of The Cement Institute?

39144 A. He wrote me one letter that I recall, and I believe that was in connection with making a trip to a meeting of The Cement Institute.

By Mr. Withrow:

Q. Mr. Blair, I show you Commission's Exhibit 1270-M and N, and ask you if that is the letter you are referring to?

A. That is the letter that I referred to.

Q. Have you ever discussed with Mr. Merrill what particular services of The Cement Institute he is inter-

39145 ested in on behalf of the Southwestern Company?

A. I have.

Q. And what services are they?

Trial Examiner Norwood: Was Mr. Merrill an employee of this witness' company?

Mr. Withrow: He was the general manager of the Southwestern Company.

Is that correct?

The Witness: Yes, sir.

Trial Examiner Norwood: I think that he will have to tell us what his attitude was.

The objection is sustained.

39146 By Mr. Withrow:

Q. Mr. Blair, I will ask you to look again at Commission's Exhibit 1270-M and N, and ask you to tell us what you understood Mr. Merrill wanted you to do in connection with the continuation of The Cement Institute, what services he wanted?

A. He was particularly interested, according to not only this but two or three discussions that we had on the matter, in statistics that were furnished him, his office, by The Cement Institute.

Q. And is that what you understood he was referring to in this letter, in the second full paragraph of the letter?

A. Yes, because he took up with me and he expected me to correlate the operation.

A. —to correlate the operations of the plant with what I felt to be the sales conditions in our territory. He constantly checked on these statistics to see whether I was getting business in the territory in line with the figures shown by the Institute for that territory, and he expected me to advise the plant whether to slow down or to
39147 increase its production in accordance with the conditions as they existed in the territory.

Q. Well, prior to that letter which you have in your hand, dated 1936, did Mr. Merrill ever discuss with you your attending meetings of The Cement Institute because of the possibility of reviving N. R. A.?

A. He did two or three times when I was in Los Angeles discuss that feature, that that might still be a vehicle for another N. R. A.

Q. Now, what other services besides the statistical services was the Southwestern Company interested in receiving?

A. We used to get a number of reports on pending legislation in Washington in a great deal more detail than we could obtain in any other way. We had copies of the proceedings in the Walsh-Healy Act, the various labor relations acts; and, I believe, the Wheeler Anti-Basing Point legislation. We got a number of those bills and discussions on that legislation, which we could not receive as economically in any other way.

39148 Q. Would you tell us, Mr. Blair, whether or not [redacted] regarded The Cement Institute as a body which [redacted]ated and dictated the policies of the Southwestern Company?

A. I certainly did not consider them that way.

Q. Do you know of any sales or marketing poli-
39149 cies which have been formulated by The Cement Institute for the Southwestern Company?

A. No, sir; not one.

Q. Have you ever agreed to abide by any sales or marketing policies formulated by The Cement Institute?

A. No, sir.

Q. Now, when the El Paso mill joined the Institute in 1933, did you receive a copy of a so-called Code of Ethics?

A. If I did, I lost it or paid no attention to it, because I recall when I was elected a trustee I wrote for a copy in order to find out what my duties were.

Q. Was that the Code of Ethics or the Articles of Association you are now referring to?

A. Well, that may be what it was. I have not paid enough attention to it to—I guess you are right, that it was the Articles of Association.

Q. Do you ever recall receiving a Code of Ethics which purported to say what were unfair practices in the cement industry?

A. I remember seeing a copy, yes, but it was merely one in the file where I kept a file of trade practices.

Q. Did you ever agree to abide by any such Code of Ethics?

A. No, sir.

Q. Did you ever distribute copies to your salesmen and instruct them to follow them?

39150 A. No, sir.

Q. And can you distinguish in your own mind between the so-called Code of Ethics and the Compendium of Established Terms of Marketing Methods?

A. No. I have seen—I guess I have seen both copies, and I have heard a lot about it, but I do not pay any attention to either one of them.

Q. Did you change the policies of the El Paso mill to conform to the provisions either of the Code of Ethics or of the Compendium?

A. No.

Q. Mr. Blair, I direct your attention to Commission's Exhibit 1275-A to D on the second page of this copy in the next to the last paragraph (handing a document to the witness).

Do you recall whether or not you met Mr. Burnett

39151 in Albuquerque as is suggested in the paragraph?

A. I did.

Q. And would you tell us what was your purpose in meeting him in Albuquerque?

A. Well, we had at one time belonged to the Portland Cement Association in New Mexico. All of the mills shipping in there regularly had belonged. Later some of the mills dropped out, and there was—we carried on the activities of the Association up there in promotion and advertising work through an arrangement whereby I think three mills stood the expense, and it was about something in connection with the expense of the Portland Cement promotion in New Mexico that that meeting was held.

Q. Was anyone else present, or just you and Mr. Burnett?

A. As I recall, there was Mr. Coy Burnett and his brother. I am not positive about that. There was no one—there were no other cement men. And I am not certain about Coy Burnett's brother, but it seems to me they were together.

Q. And could you tell us what the circumstances were that made you want to discuss the question of P.C.A. with Mr. Burnett at this time; that is, in April, 1936?

A. Well, as I recall now, he was trying to kick out of the expense up there, and we did not want to stand it all. We felt like we were not getting all the benefit. We certainly did not want to carry all the load.

39152 Q. Now, were any pricing or marketing policies discussed with Mr. Burnett at this meeting in April, 1936, or was it just on this matter of P.C.A. expense?

A. Nothing except the P.C.A., that I can recall.

39156 By Mr. Withrow:

Q. Mr Blair, I direct your attention again to the second paragraph of Commission's Exhibit 125-G to H and ask you if that paragraph refers—

Trial Examiner Norwood: Did he write the letter?

Mr. Withrow: Yes.

By Mr. Withrow:

Q. —refers to anything else but the activities of the Texas Cement Industries?

A. Well, the Mr. Clark referred to there is the Portland Cement Association. The reference there to the
39157 public relations set-up refers exclusively to the Texas Cement Industries.

Q. Now, did you meet with Mr. Boice and Mr. Warden as is set forth or referred to in that second paragraph, Mr. Blair?

A. Yes, sir.

Q. Would you tell us your reasons why you met with those two gentlemen?

A. Mr. Warden was the engineer-manager of the Texas Cement Industries, and Mr. Boice and I were the executive committee which had the supervision over Mr. Warden's activities between the regular meetings of the Cement Industries.

Q. And when was it—that is dated in May, 1936?

A. That is correct.

Q. Now, what were Mr. Warden's duties and activities?

A. His duties were to promote good relations between the cement companies and the public generally and to look after some legislative matters that came up at Austin. He also did a large amount of work with various schools in developing the interests and the good will of the cement industry with the school students.

Mr. Wooden: Now, Your Honor, since the witness has gone into this, I feel I should withdraw any concession I made regarding the Texas Cement Industries.

39158 Q. Could you tell us what difference there is between the activities in Texas of the Portland Cement Association an the Texas Cement Industries?

A. The activities of the Portland Cement Association dealt largely with material, while the activities of the Cement Industries dealt largely with individuals.

39159 And could you tell us why a representative of the Portland Cement Association was present at this meeting referred to in the second paragraph?

A. It was not so much the reference there to Mr. Clark as it was to Mr. Warden. Mr. Warden had previous to this time been the district engineer of the Portland Cement Association, and we were a little bit fearful at the beginning of this that he might overlap the activities of Mr. Clark of the Portland Cement Association, and we wanted to divide the line there so that there would be no conflict in the activities one with the other.

Q. I misspoke myself. I said Mr. Clark was present. The second paragraph indicates he was not.

Now, would you tell us whether or not Mr. Clark, of the P.C.A., was present?

A. He was not present, as I recall, at the meeting between Boice, Warden, and myself. I did see Mr. Clark while I was in Austin at that time.

39160 By Mr. Withrow:

Q. Now, did anyone from the El Paso mill par-
39161 ticipate in the preparation of the N.I.R.A. Code for the Portland Cement Industry?

A. No, sir.

Q. Now, after the Code had been approved by the

President, did you have to change any of your practices as a result of the terms and provisions of the N.R.A. Code?

A. Only one that I recall.

Q. And which one was that?

A. The filing of prices with the Code Authority.

Q. I believe you testified about another, if I recall, about the cash discount in Arizona.

A. Oh, yes, we did. We did have to change our discount terms in the State of Arizona, and we had to tighten up a little more rigidly on the acceptance of discount terms in our other territories.

Q. Now, when did you begin to file your prices with the Code Authority?

A. As soon as we received instructions from the Code Authority that that was one of the provisions of the N.R.A., as soon as it was effective.

Q. And did you continue to file them with the Trade Practice Committee after the Code was declared unconstitutional?

A. I do not recall whether we filed any or not. If we did there were so few that it made no impression whatsoever on my memory.

39162 Q. Now, do you recall the Executive Order 6646 concerning permission to deviate 15 per cent on business to the Federal Government,—deviate from filed prices?

A. I remember seeing it, yes. I couldn't quote it to you.

Q. Now, did you ever bid a price to the Federal Government pursuant to this Executive Order?

Mr. MacIntyre: Just a moment.

I think that Counsel has the wrong number there. That is, 6767 is the Executive Order, in the case as Commission's Exhibit 179 as a modification of 6646.

Trial Examiner Norwood: I think we understand what he means, anyway.

Mr. MacIntyre: Yes.

Mr. Withrow: I think Mr. MacIntyre is correct.

Trial Examiner Norwood: That is the 15 percent tolerance clause, isn't it?

Mr. Withrow: That is right, your Honor.

Trial Examiner Norwood: Go ahead.

The Witness: What was the last question?

Trial Examiner Norwood: Read it.

(Last question read.)

A. You mean with the discount off?

By Mr. Withrow:

Q. Taking advantage of the 15 percent tolerance.

A. I do not recall that we ever did.

39163 Q. Could you tell us the reasons for not taking advantage of this 15 percent?

A. Well, as I recall, the calls for bids that we had during that time were very limited, and we did not feel there was any justification for that kind of a discount on Government business.

Q. Was there any agreement between you and your competitors not take advantage of this 15 percent tolerance?

A. No, sir.

Q. Now, has the El Paso mill ever filed prices with any organization other than the N.R.A. Code Authority for the Cement Industry and possibly a few with the Trade Practice Committee?

A. No, sir.

Q. Mr. Blair, do you recall an exchange of letters between yourself and the Code Authority in early 1934 relating to prices filed from the points in New Mexico, Cubero and Corona?

A. Yes. I have seen those letters in exhibits here.

Q. I show you Commission's Exhibit 911-K and L and ask you if those are the letters you refer to (handing the document to the witness).

A. Yes, these are the ones.

39165 Q. Did you ever enter into an agreement with your competitors as to what prices should be filed with the Code Authority?

A. No, sir.

Q. Or with the Trade Practice Committee?

A. No, sir.

Q. Do you recall, Mr. Blair, the provision—in a general way, the provisions of Article XI of the Cement Code? That was the one on customer classification, business classification.

A. I recall such an article in there, and I think a good many of the provisions.

39166 By Mr. Withrow:

Q. Did you receive any protest from your customers about this Article XI of the Code, Mr. Blair?

A. I think there were some objections. They were not enough to impress themselves vigorously on my mind, however.

Q. Well, did your company take any steps concerning these protests?

A. No, we just told the dealers that that was part of the N.R.A., there was nothing we could do about it.

39167 Q. Did your company change its policy with reference to the classification of business in order to conform to Article XI of the Code?

A. I think there was very little, if any, change in our policy.

Q. And did you change your policy or practices as the result of the suspension of this Article XI?

A. No, sir.

39168 Q. Mr. Blair, I show you Commission's Exhibit 176, and direct your attention to paragraph 11, subparagraph (b). Would you tell us whether or not you have found for a number of years, the last couple of years, that that provision has been contained in Government invitations?

39170 A. It has been in all bids since the passage of the Walsh-Healy Government Contract Act, and I think that was either in 1935 or 1936, as my memory serves me.

By Mr. Withrow:

Q. You stated in your stipulated testimony, Mr. Blair, that it has been the practice of your company to meet the competition that you find in selling your cement except under certain unusual circumstances. Did the N.R.A. Code for the Cement Industry change that situation in any respect?

A. No. We were allowed to file another price if we found a lower price filed by competitors.

By Mr. Withrow:

Q. After the Code was invalidated on May 25, 1935, did your company agree with its competitors to maintain in effect any or all of the N.R.A. provisions for the cement industry?

A. No, sir.

Q. Did you, individually, continue any of the practices which you had engaged in under the Code?

39171 A. I think we followed most of them. I know one with reference to the hours of our office I have maintained to this day without change.

Q. And what were your reasons for continuing some of the things?

A. Well, we found that we could get our work done just as efficiently under the hours we were working, and it has worked out very well now because we are having to do some of it under the Wages and Hours law.

By Mr. Withrow:

Q. Now, did you continue any of the marketing or sales practices which you followed under the N. R. A. Code? Have you continued any of those?

A. Practically all of them. They were in effect prior to the Code, as well as during the Code.

39180 The witness identified Resp. Ex. 3007 as a document prepared under his supervision. He vouches for the accuracy of the information contained therein.

I would like to offer in evidence Respondents" Exhibit 3007 (handing the document to Mr. Wooden).

Mr. Wooden: We object to Respondents' Exhibit 3007, for identification, on the ground it is irrelevant and immaterial, simply going to the percentage of cement costs to the total cost of jobs.

Trial Examiner Norwood: What do you want to show by this?

39181 Mr. Withrow: Well, in one of the allegations in the complaint, both in the charging paragraph, and in the effect, it is alleged that as a result of this alleged combination we have raised the cost of public roads and public projects and private structures by the amount, because of the high price of cement, and I would like to show just exactly how small percentage and how small proportion of the price of projects or the cost of projects cement constitutes, because they attempted to put in oral proof, and they have alleged it as a part of their charging paragraph, and certainly every single time we have gone un before the Federal Trade Commission, the Commission's Counsel have argued that one of the reasons why some rule should be overridden in this case, was because of this adverse effect it would have on the public interest, and I am

offering this as having a bearing on the question of public interest, and whether or not it tends to prove the conspiracy; under the decisions of the Supreme Court we are entitled to put in proof on the matter of public interest.

Trial Examiner Norwood: The objection is sustained.

39184 Washington, D. C.,
Thursday, May 23, 1940.

39185 ERNEST V. APT, called as a witness on behalf of the Respondents, being first duly sworn, testified as follows:

39186 *Direct Examination by Mr. Withrow.*

My full name is Ernest V. Apt. I am associated with the Southwestern Portland Cement Company, being with the Osborn mill. I hold the position of traffic manager and assistant salesmanager. Prior to July 1, 1937, I held the position of traffic manager and salesman.

39188 Q. Did you mention Lehigh?

Trial Examiner Norwood: Now, were you connected with the selling of cement or were you traffic manager?

The Witness: I was selling at that time, sir.

Mr. MacIntyre: If Your Honor please, I want to object now to any further duplication of this character of the record through this witness. His manager, Mr. George Warren, gave identically the testimony that this witness has given, and I object to further duplication of that character through this witness.

Trial Examiner Nowood: Counsel's point is well taken.

Mr. Withrow: I would like to have the record cited when charges of that type are made, Your Honor. I am sure I must have read Mr. Warren's testimony more

39189 recently than Mr. MacIntyre.

Trial Examiner Norwood: Well, isn't it in the record what companies sell in this territory?

Has the Counsel submitted any sort of offer of proof on this witness, or any stipulation at all?

Mr. MacIntyre: They have not.

Mr. Withrow: I thought that all references to this were off the record.

Trial Examiner Norwood: No, I am asking you that on the record in connection with my ruling and request of the subsequent witnesses.

Mr. Withrow: Well, in view of the fact that we have not been able to get together with, and even got refusals of Counsel for the Commission to stipulate in certain instances, I would want to specifically object and move to strike Your Honor's statement and Mr. MacIntyre's statement on this matter, as the Respondents are prejudiced, and I move that they be stricken at this time.

Trial Examiner Norwood: Motion is denied.

I am asking the Counsel here with respect to what evidence he proposes to bring out through this witness. I have a right to ask that. It is my duty to ask that. And I do now repeat that question to him, and ask him to give me a reply.

39190 Mr. Withrow: If you will tell me, Your Honor, exactly what you want to know.

Trial Examiner Norwood: I asked you if you had submitted any stipulation.

Mr. Withrow: Well, the answer to that is no.

Trial Examiner Norwood: Have you any written offer of proof?

Mr. Withrow: I do not have a written offer of proof.

Trial Examiner Norwood: Well, will you kindly tell me what you propose to bring out by this witness?

Mr. Brick: Does Your Honor mean with regard to all of his testimony?

Trial Examiner Norwood: Yes.

Mr. Brick: Or to this particular line?

Trial Examiner Norwood: All of it.

The subjects that you want to cover.

Mr. Brick: Then we have to cover his testimony twice; first, cover it with you, and then with the witness.

Trial Examiner Norwood: I am asking the Counsel here, who is going to examine this witness, and if he will just tell me that—

Mr. Brick: I am explaining to Your Honor our position in these matters. I have done it before and I thought that was definitely cleaned up.

39191 Trial Examiner Norwood: I wish that you would permit him to answer my question.

Mr. Withrow: Am I being instructed I have to answer your question? Mr. Brick has explained our position, which is, we do not want—

Trial Examiner Norwood: You have to either answer my question or refuse to answer it, one or the other.

Mr. Withrow: Mr. Brick, in the past, it appears on the record, has explained to you why we think that is an improper request and improper procedure. Now, this is a position which Your Honor has never taken in the past. If you direct us to do it, that is something else. In the past Your Honor has been content with our statement as to our reasons for not going into this matter in this way. Now, if Your Honor is directing me to do it; why, that is something else.

Trial Examiner Norwood: Read my question.

(Statement of the Trial Examiner read by Reporter.)

Trial Examiner Norwood: Read the last question.

(Record read.)

Trial Examiner Norwood: I asked him there if he would make an offer of proof.

Will the Counsel now make an offer of proof as to this witness' entire testimony, or testimony on the subjects he wishes to cover?

39192 Mr. Withrow: I want to go with this witness into the question of his activities, his sales activities, in an effort to bring out the sales activities of this witness on behalf of his company, for him to supplement and testify briefly about his contacts with the pricing practices of his company in so far as it affects him in his work. I want him to testify with reference to certain things concerning the trucking of cement in the territory where he has sold; the question of f.o.b. mill requests in the territory where he sells; the question of diversions; the question of the use of freight rate books; the question of the classification of customers, and many other subjects of similar nature which have come to the attention, the specific attention, of this witness in his activities, and it will not—it is from a different angle, and is not intended to, and I believe will not, duplicate in any way the testimony which has already been given by any other Respondents or by the vice-president and general manager at Osborn, Mr. George Warren. If that is—

Mr. MacIntyre: If Your Honor please, I just want to call your attention to the fact that those particular subjects have been covered through the testimony of this man's superior, Mr. Warren.

Now, of course, as we have stated heretofore, we do not

object to testimony that is of a real, relevant, and material character, that would add to Mr. Warren's tes-
39193 timony on that subject, but we do object to a covering of the same subject within this scope of Mr. Warren's testimony and without adding materially to it except in bulk. And I also want to point out that the bringing of this witness in in this way is—that is, after Mr. Warren has testified, and after two other witnesses from the company have already testified—

Mr. Withrow: What two?

Mr. MacIntyre: —is a good example of how we could, of course, run this case without end.

Mr. Withrow: We might start by finding out the names of the other two.

Mr. MacIntyre: We have had Mr. Warren—in fact, we have had three, Mr. Warren, Mr. Blair, and Mr. Merrill from this company on the stand in this case, and Mr. Jennings, making four, if you please.

Mr. Withrow: Now, three of those were Commission's witnesses. I do not know that we are bound to count them as our witnesses, when they call them as their witnesses; and, furthermore, I would like to point out that Mr. MacIntyre assumes in a very cavalier manner and fashion that we are going to cover the same things. He does not know what questions I am going to ask. I do not see how I could ask questions which would not in some way refer to some matters that have been treated before, because cer-
39194 tainly we are all dealing with cement here, and if he could criticize me on that basis, or if we are going to talk about prices, of course there have been statements about prices, but the specific testimony this witness is going to give has not been covered by any other witness, and could not be covered by any other witness since he is the one that did it, and no one else would have known what it was.

Trial Examiner Norwood: Now, I have asked the Counsel to state to me any difference that he proposes to show from these usual methods as to picking up prices, and quoting, and getting information in the field through its salesmen and dealers, as to making and keeping records, and as to his policy and circumstances relating to trucking, and—

Mr. Withrow: Your Honor, I do not intend to go into any of those matters at all.

Trial Examiner Norwood: Off the record.

Please let me finish my statement.

On the record.

And as to the use of freight rate compilations, and as to selling the Government f.o.b. destination with the control clause, and so forth, as to diversion of shipments, and as to the importance of the dealer trade and the desire of the dealers for delivered price quotations, and the ap-
39195 proval of Respondents' selling policies, and as to the reporting and checking of the contracts. Now, I say I have asked him numerous times if he has any new information on those subjects, different from what we received here a great many times with respect to these other Respondents, and he has the opportunity of taking advantage of this other testimony that has been given. In fact, in the state of the record I think you can imply it now.

Now, I have not been able to get any specifications as to these differences in the majority of cases except that they apply to a different Respondent. Well, I do not consider that a substantial difference in the circumstances.

Now, I am going to exclude particular testimony on the subjects I have named here and give you one exception to cover the whole thing, from other witnesses as to other Respondents, because we have not time to receive all of these familiar details with respect to every other Respondent that is coming up here.

Now, if there are any essential differences here we will take the time to hear them, but if they are not I am going to exclude it, from this witness, and from all subsequent witnesses; and especially with this witness as to these sub-
jects which have been covered by witnesses from
39196 this Southwestern Cement Company.

I think that statement is sufficiently clear to give you all the exception your need on that, but I am doing it because it is absolutely necessary that we do not take any further further time going over the entire story with each subsequent Respondent. You have no right to do that. There is no necessity for it.

Mr. Brick: May I be heard, if Your Honor please?

Trial Examiner Norwood: Yes.

Mr. Brick: I think it important that we express our view to the effect that we do not agree with the claim which Mr. MacIntyre has made to Your Honor, and which Your Honor was apparently adopted. We feel—

Trial Examiner Norwod: No. I took my position prior to Mr. MacIntyre's expression.

Mr. Brick: Yes, each of you have taken the same position ever since we started putting in the defense. I do not see that the point of time.

Trial Examiner Norwood: No, that is not true.

Mr. Brick: Well, may I continue?

Trial Examiner Norwood: As the record plainly shows.

Mr. Brick: Well, there has been constant pressure, if Your Honor please.

Trial Examiner Norwood: I do not like to contradict Counsel.

39197 Mr. Brick: I am expressing an opinion. If it is a matter of fact, we each might have the same view, but anything I might say is a matter of opinion. It is the witnesses who discuss the facts.

Trial Examiner Norwood: No. You attempted to express a fact there.

Now, go ahead.

Mr. Brick: Well, I would rather not be brought off on a tangent.

We object to any restraints which are placed upon our freedom to present the defense in a manner in which we in good faith feel it should be presented. The restriction which Your Honor attempts to impose is one which is not consistent, we feel, with the rights of these Respondents.

Another point is that we do not think we would be properly protected from the standpoint of the record merely to make an exception to Your Honor's ruling; that is, in cutting us off; because unless we have the matter in the record which we seek to present through the witness there is no opportunity for the Commission or the courts to know what we propose to do.

Now, it is our claim that we are only offering matter here which we believe to be significant with regard to the defense, and I say that advisedly and in contrast to

39198 the material offered by Mr. Wooden, which we do not think in all respects was significant to the proof of his case.

Now, we are trying to at least adopt that restriction, and we think we have fallen within the lines of it. I do not see how we could properly be protected on the record in any case where we did not offer to prove the matter which Your Honor does not desire to take. I do not think that can be done generally, or that we can borrow from one witness the

testimony of other witnesses, when they are of different companies, and when their activities are different and might be motivated by different circumstances and different reasons.

I might say that fundamentally, of course, we do not subscribe to any theory which would place upon us the burden of first showing a difference in practices before we are permitted to introduce evidence. We do not concede that the fact of similarity in and of itself leads to the conclusion of agreement. That is the basis of this case, and the Government's case has been one where they bring in prices which they claim to be identical, because the figures are the same, and from that assume that they must be the same because the various parties who quoted those figures must have had an agreement.

Well, that has come in as circumstantial evidence. That is only an illustration; there are practices, some of
39199 which are the same on the part of different companies.

Now, we want an opportunity to permit the companies to come in and to explain why they do a certain thing in a certain way, even though that might be the same way in which the matter is taken care of by another Respondent, and their reasons may be the same, too, but that does not preclude them from expressing those reasons, and those reasons may be more consistent with competition than inconsistent with it, and if is on that basis, we ask Your Honor to permit us to be the judges of what we think is material to the defense by way of the offer of testimony.

Your Honor was the right to exclude it, but we feel that we should have the right to offer it.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: We offer no objection to the testimony of this witness if it is to be materially different on relevant maters from the testimony given by other witnesses from this company, or if the testimony of this witness is in explanation of acts, specific acts of this witness which have been put into evidence, or explanations of any of his writings that have been put in evidence, but beyond that we do object.

Trial Examiner Norwood: I think that Counsel is
39200 sound in that position.

Now, let us not go off on a tanget as Counsel has

said, but the question here is to avoid an unnecessary waste of time in a way that will be of no prejudice to these Respondents.

Now, I think I made myself perfectly clear about that. It is not necessary to re-hash these details, and if there are essential differences in the general practices, then I think that it is the duty of Counsel to point out to me the essential differences before we spend the time on it. You can go into this thing and spend days on it; and when we get through we find that there are no essential differences except that this is another Respondent.

Now, of course, these companies may meet any special evidence that is in here against them, and tell us the particulars of these things, and I think if Counsel will give some thought to this proposition they will find that it will be an advantage to them as well as to anybody else, but we cannot go on indefinitely, and this is not the United States Senate, and there is no right of unlimited debate and unlimited procedure here in an unlimited number of instances.

I am going to exclude this testimony that I have described here. You have a right to adopt it, you already have an understanding as the record shows 39201 that you can adopt any evidence given for any Respondent, and in one case there you did adopt some of it, and I request the Counsel to go ahead and abbreviate, so far as it is possible, and as able Counsel I know that you can do it, and it is no use of our disagreeing about this in any substantial way.

Mr. Brick: Well, that is just what I had in mind and mentioned, Judge. I wanted to point out that I think that our purposes in some respects are the same, and that we have taken every short-cut method known to us to shorten the length of time a witness will be on the stand.

Now, the procedure while the Government was putting in its case was slow. We did not get much testimony into the record in those days. It went on for over a year—

Trial Examiner Norwood: Well, do you know the reason for it?

Mr. Brick: Yes, sir.

Trial Examiner Norwood: Go back and look at the record.

Mr. Brick: Yes, sir; I know the principal reason for it, and I do not think that same reason applies with re-

gard to us in spite of the fact that we have had constant interruptions on the part of Counsel, and many requests on the part of Your Honor to explain what the
39202 various items of evidence were intended to show.

We feel that if we had been given complete freedom with regard to various offers we would be very much further advanced in our defense now than we actually are. After all, a good part of this defense record has been taken up with the statements of Your Honor and statements of Commission's Counsel and our own statements which we had to make in response to those made by you gentlemen.

Now, we have no objection at all to speeding up matters within reason, and we have been trying to do it. We have adopted the stipulation method of taking care of part of the proof where we thought that would be satisfactory and would not be prejudicial, but we did that after a great deal of unpleasant discussion with Commission Counsel. The first four we offered were rejected, but we kept on offering them and making every possible concession we could in order that we could adopt a form which would be agreeable to Commission's Counsel. Now, I think we have agreed on a form which has been helpful, and I think both sides now see that that situation does exist with regard to speeding up the testimony.

Mr. Wooden: I do not agree. I do not agree that it has. I think in some respects it has served to further complicate and delay the handling of the case, as instanced by the last stipulation with regard to Mr. Blair.

39203 I want to put on the record at this time—

Mr. Brick: May I finish, Mr. Wooden, before you interrupt me again, please.

I appreciate Mr. Woden's position. It has been consistent ever since we started with the defense, he and Mr. MacIntyre have been very clear in indicating that any defense to this case was a waste of time. They apparently did not expect we were going to bring witnesses here and submit them for cross-examination. We have done that, and we expect to continue to do it and in spite of any pressure that is put upon us we do propose to continue our program of calling witnesses here and bringing from those witnesses the matters which we think are significant with respect to the defense, and in every place where we can we will take short-cut methods, but I think if we could

eliminate this discussion of insignificant collateral matters, we would make considerably more headway than we have.

Mr. Wooden: I want to say on the record, Your Honor, that what I have said before off the record in the presence of Counsel for Respondents, that not only has their course since they began the presentation of testimony been one of delay and obstruction and taking unnecessary time, but we had information in advance that that would be their policy, and that they did not expect to beat this case on the merits.

39204 Mr. Brick: I think we are doing pretty well, Mr. Wooden.

Trial Examiner Norwood: Now, wait a minute.

Mr. Wooden: All right.

I would like to say this further that an actual check of the record made before we closed our case technically last June shows that practically half of that transcript was made up of non-testimonial matter caused by the obstruction and delay methods of Respondents' Counsel.

Mr. Brick: Well, I take exception to the cause. The fact that there was 50 percent of the record devoted to discussion, I imagine might be true, because after all Your Honor is well acquainted with the character of the testimony and the character of the exhibits which were offered by Mr. Wooden, and in spite of that he does not put in the point that we helped him out to the extent of waiving identification with regard to any papers, with two or three exceptions, if they claimed that they had been written or prepared by any industry man, and that waiver applied to more than 3,000 documents, and in each of those cases he did not have to go to the trouble of proving them.

Those are matters which I would like Your Honor to bear in mind before there are any charges about wasting time.

39205 Trial Examiner Norwood: Well, I think the record shows how the situation is.

Mr. Brick: Yes, sir.

Trial Examiner Norwood: And it is not necessary to decide these matters. All I know is that I have done the best I could, and I am familiar with all these subjects here, and I am taking responsibility of forbidding and excluding any re-hashing of these familiar details, and in taking of further time.

Now, the Government put in their case. They necessarily

put in a great deal which the Respondents will rely on, and there is no use of duplicating that, and on the cross-examination I permitted Respondents at different times to put in a great deal of material that was objected to by the Commission because it was the Respondents' case and should be put in later, and some of that, as I remember now, has been duplicated, and the necessity is present for abbreviating this thing, and I have made suggestions and I have made announcements on the record which the Respondents have largely ignored, and I want to ask them now to abbreviate this testimony so far as these familiar details are concerned. You can tie them up with a particular Respondent by one question, and I know that you are good lawyers and you are able to do that if you want to do it.

Mr. Brick: We will certainly do the best we can,
39206 Judge.

And I would like to mention this, that we must remember that each of the seventy-five or more Respondent Companies has been charged to answer a Commission record of over 50,000 pages, and I think that any company which gets on the stand and in one, two, three, or four days disposes of its defense with respect to such a record is doing a good job; and in no case since the second month that we have been putting in our defense have we taken on the average of more than two days, or at the most three days per witness, and I think that is an observation which Your Honor might well keep in mind as an illustration, as a concrete illustration of the effectiveness of the short-cut methods which we have taken. There was nothing like that in connection with the presentation of the Government's case.

Mr. Wooden: The record shows.

Trial Examiner Norwood: Well, I want to state for the record here that I do not excuse the Counsel for his insinuations of bias on the part of the Examiner which he has made this morning, and which he has very subtly conveyed heretofore many times.

Mr. Brick: Well, I think Your Honor has more confidence in my expressions of subtlety than I have myself. I think Your Honor's criticism of statements that I
39207 made in which Your Honor was involved was that I was too frank about it.

Now, I certainly will not agree with Your Honor that I had made any attempt to be subtle. Anything I have to

say I will say just as directly as I can, and I think Your Honor is entitled to know our position on every case, and I hope that when we get before the Commission it won't be necessary for us to be in a position of raising matters for the first time. We have been frank with Your Honor, and I think that is the best policy.

Trial Examiner Norwood: I am going to be frank with you. You were frank with the Commission, too, but the Counsel very often link the Trial Examiner up with the attorneys on the other side, and in view of my efforts here to get the right answer each and every time I think it is very unjust to me and very uncalled for by the circumstances. The record will show it.

Mr. Brick: Certainly.

Trial Examiner Norwood: Go ahead.

Mr. Withrow: I believe at the beginning of Your Honor's statement you were in the course of making a request on me, and I started to answer when the Examiner paused and I was thrown off the record. It has been so long ago I do not even know what your request is, and that
39208 is my reason for not answering. If you want it answered, if the Reporter will bring it back and read it to me, I will do my best to answer, but I was attempting to answer it when I was thrown off the record by Your Honor, and I do not know what the request is.

Trial Examiner Norwood: You were referring to the subjects that you expected to touch on with the testimony of this witness.

Mr. Withrow: No.

Trial Examiner Norwood: And I supposed that you had completed your statement.

Now, if you want to make any further offer of proof with respect to this witness, why, I am ready to hear you.

Mr. Withrow: Well, Your Honor and I are talking about two different things.

Your Honor, it was after I made my statement on that that Your Honor started to make a statement in the form of a question of me, to which I attempted to reply, and Your Honor threw me off the record and said he would not hear me at that time.

Now, I do not know what the request was, and I want the record to show that I am offering to answer your Honor's question, if the record is brought back and read to me, or if Your Honor tells me what it is, but I do not

39209 want to attempt to answer a question when I do not know what the question is.

Trial Examiner Norwood: That is, you would answer it if you knew what it was.

Mr. Withrow: I would.

Trial Examiner Norwood: I think that is satisfactory. Go ahead.

By Mr. Withrow:

Q. Would you tell us, Mr. Apt, when the Southwestern Company—or when you discontinued being the salesman in the Cleveland area?

A. I believe it was about June or July, '31.

Q. And would you tell us briefly the reasons why you ceased—why you stopped being salesman in that territory at that time?

Mr. MacIntyre: Objected to as immaterial.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: Why do you want to bring that out?

Mr. Withrow: Well, it will become apparent, Your Honor, that he discontinued his efforts there because the company ceased to solicit business in that area, as part of the circumstances surrounding some specific testimony offered on behalf of the Commission.

Trial Examiner Norwood: In respect to refusing 39210 a bid?

Mr. Withrow: No, not in respect to refusing a bid; it is in reference to an entirely different matter. With reference to trucking, if Your Honor wants to know, and with reference to specific testimony by Witness MacIntyre.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: Which, of course, was stricken by Your Honor.

Now, if they are offering this with the expectation that that testimony is to be reinstated on an appeal to the Commission, and with the expectation that what they are offering now is to meet that testimony, which they expect to be reinstated, if that is their expectation, of course we cannot object to them making such an offer to meeting it.

Trial Examiner Norwood: The objection is sustained.

Mr. Withrow: I offer to prove through this witness that

just prior to the time when Mr. Apt discontinued soliciting business in the Cleveland area, that he found and reported to the company that the delivered prices around Cleveland had been reduced about 40 cents per barrel, and that shortly thereafter the Southwestern discontinued soliciting business in that area, and that he was transferred to another sales area and did not solicit business in Cleveland.

39211 Trial Examiner Norwood: Go ahead.

Mr. Withrow: Now, with reference to that statement that Mr. MacIntyre made, I have read the record several times with reference to Mr. MacIntyre's testimony about a certain meeting in Cleveland, and certainly the record is not clear that all his testimony was stricken.

If Counsel for the Commission will assure me at this time that all of it is stricken, perhaps we can save some time with reference to testimony on this; but the record certainly does not show that it has all been stricken at the present time, and, as a matter of fact, both he and Mr. Wooden have cross-examined witnesses on the basis of its being in the record at the present time.

Now, I only want to know where it is, whether it is in the record or whether it is out of the record.

Mr. MacIntyre: We are proceeding on the theory that it will ultimately be in the record, and if they expect to meet that specifically through this witness, we have no objection to them doing so.

Mr. Withrow: Then, why did you object?

Trial Examiner Norwood: I understood it was out.

Mr. MacIntyre: It has been stricken, according to our understanding, but we are proceeding on the theory that it will ultimately be in the record.

Trial Examiner Norwood: Does the Counsel want
39212 me to reinstate it?

Mr. Withrow: Well, I move to strike at this time all of the cross-examination and direct examination made by Counsel for the Commission based on the testimony which they now concede has been stricken. I move that it be stricken from the record, and if Your Honor will support me in that I will be very glad to cite pages and lines.

Mr. MacIntyre: If Honor please, what they are asking now to be stricken in part is simply this: The cross-examination of Mr. L. C. Letzkus, which was held in New York two weeks ago, containing in part an admission

of his that he attended the meeting in Cleveland on November 27, or thereabouts, 1931, in the Hotel Hollendon, at which he and his competitors and certain dealer organization leaders discussed the elimination of the trucking problem, and that was brought out on cross-examination through Mr. Letzkus to meet direct testimony that he had given that he had never discussed such competitive problems or entered into any understanding or agreement with competitors surrounding such competitive problems.

Trial Examiner Norwood: Now, how does this proffer of testimony apply to that?

Mr. Withrow: Well, I thought we would get to this in very logical manner by first showing that this witness, although he had once been in the Cleveland territory,
39213 was no longer in the Cleveland territory, and was not in Cleveland at the time, and did not attend the meeting. It would have necessitated a specific trip to Cleveland, and he made no such specific trip.

Now, I think it is all tied up and has some bearing on the situation rather directly.

Mr. MacIntyre has testified on the record that this witness attended the meeting, and Mr. MacIntyre, as in other instances, including the statement as to what the cross-examination of Letzkus was, is in error about what he stated in the record.

Trial Examiner Norwood: If the Counsel wants to put in testimony to deny that, and let it operate to restore that testimony that has been stricken, which it would naturally do, he may do that.

Mr. MacIntyre: We have no objection—

Trial Examiner Norwood: He may cite the record here this morning to show the situation, and it will not be to his disadvantage in any way.

We had better skip over this and go on.

Mr. MacIntyre: If Your Honor please, we have no objection to them showing through this witnes the facts that the Counsel has offered to prove. Whether or not the testimony is restored, we think it is material and relevant.

39214 Trial Examiner Norwood: All right. Go ahead. That is exactly what I said.

Mr. Withrow: Well, do I understand that he withdrew his objection to the last question?

Mr. MacIntyre: I have.

Trial Examiner Norwood: Go ahead.

By Mr. Withrow:

Q. After you moved from the Cleveland area, in what territory did you solicit business, Mr. Apt?

Mr. MacIntyre: That is immaterial. It is objected to.

Mr. Withrow: Merely preliminary.

Trial Examiner Norwood: Objection overruled.

A. In the territory adjacent to our mill at Osborn.

By Mr. Withrow:

Q. Was that Green, Clerk, and Montgomery Counties?

A. Yes.

Q. Were you the only salesman in that territory?

A. For our company, yes.

Q. And about how much tonnage do you sell in those three counties annually?

A. Well—

Mr. MacIntyre: That is objected to as immaterial.

Trial Examiner Norwood: Objection sustained.

Now, I am going to stand this witness aside and
39215 give you an opportunity to present a stipulation, or written offer of proof, so that I may have something tangible before me in order to make a decision on this duplication.

I see your other witness is here, and we will recall him. You can recall your other witness. He is in the house here.

Mr. Withrow: I take exception, Your Honor, to removing this witness from the stand at this time for the reasons which Your Honor stated.

Trial Examiner Norwood: I permitted this man to go on in the absence of the other witness, and he is now in the house, and there is nothing irregular about that, and you have your exception.

WILLIAM R. BLAIR thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Blair, I would like to direct your attention again to the matter of land-grant rates, which we have covered partially the other day.

Would you tell us how you have found that the
39216 land grant rates are given to the sales department by the traffic department as compared with the

land-grant rates which you find that the Government figures in connection with the tabulation of bids?

A. Land-grant rates, as a rule, are carried out a great many points, and there is a slight variation sometimes in those minor fractions.

Q. Now, in the event that the various sources of information which you have already mentioned for land-grant information show different land-grant rates, which one do you use?

A. The lowest.

Q. You testified yesterday, I think, that there were no land-grant rates in Texas. Do you know on which lines in Arizona and New Mexico you find land grants exist?

A. In Arizona most of them exist in the western
39217 part of the State, and also in the northern part of the State in what is commonly known as the Santa Fe Coast Line.

In New Mexico, on the same line, that is, the Coast Line of the Santa Fe, they apply west of either Isleta—that is spelled I-s-l-e-t-a—or Dalies, D-a-l-i-e-s, N. M. That is from El Paso.

And from California points, from Kansas or Colorado producing points, I am not just certain where they apply, but I think it is west of the same points.

Q. And your mill is located on the Santa Fe Railroad?

A. That is correct.

Q. And on tendering shipments from your mill for shipment on Government bill of lading with land-grant rates, would you tell us whether they normally move over just one railroad or over several?

A. Most points from El Paso would normally move over just one line.

Q. Now, in both, in your stipulated testimony and also on the stand, you have used the phrase "Meeting competition." I would like you to explain to the Examiner what you meant by that phrase, Mr. Blair.

A. Meeting the lowest price that we find in the territory where we are attempting to serve or do business.

Q. And you have also used it now in connection not only with price but in connection with services.

39218 A. Services, discount terms, and so forth.

39219 By Mr. Withrow:

Q. What effect does the competition which you find in your territory have on your methods of doing business, Mr. Blair?

A. It compels us to exert every effort and ingenuity in our possession to secure business for our own company.

Q. And would you just list briefly some of the special types of efforts which you have made as a result of finding this competition?

A. We try to develop first a close—as close a personal friendship as we can with the customers. We try to find their hobbies; try to work with them in the various manners; try to show them some dignified entertainment at times, and anything that we think will put our company in a favorable light with those customers.

39220 Q. Has the existence of price competition affected your ability to sell your cement at a higher price than your competitors offer to sell it?

Mr. Wooden: Objected to.

Trial Examiner Norwood: Read the question.

Mr. Withrow: Well, I withdraw it.

By Mr. Withrow:

Q. Mr. Blair, have you been able to sell your cement at a price higher than your competitors?

A. I think only once or twice I have been able to do that, and it was usually for special reasons when that was done.

Q. Has the existence of the quoted prices of your competitors in any way affected the quoted prices which you would make at any particular destination?

39221 A. Yes—

Mr. Wooden: Your Honor, we are now going over what the stipulation covers.

Trial Examiner Norwood: Read the question.

(Last question read.)

Trial Examiner Norwood: I think that has been shown with respect to this company.

Mr. Withrow: I offer—

Trial Examiner Norwood: Everybody knows the answer to that.

Mr. Withrow: I offer to prove through this witness—

Trial Examiner Norwood: Wait.

We are unfortunately confronted with this condition: Ruling out this unnecessary testimony does not save any time. It is so managed, through offers of proof and discussions, that the Trial Examiner, with the procedure that is being used here, has been powerless to expedite this

proceeding, as it appears very clear and necessary that it should be done. So I will ask the Counsel to abbreviate his offer of proof so far as he can.

Go ahead.

Mr. Withrow: Well, if I had not been interrupted about six times in the last five minutes, we would have passed this subject already, and if Your Honor does not want to hear testimony about the existence of price
39222 competition, I do not know what we are here for.

Trial Examiner Norwood: You were not interrupted when you were talking about price competition.

Mr. Withrow: Well, I certainly am talking about price competition, its existence and effect on quoted prices. What this company does distinctly shows how price competition operates, and what effect it has. That is all price competition is, the inter-action of prices quoted by one company upon the prices and practices of another company. I do not see what could be more material and relevant.

Trial Examiner Norwood: You want to show now that he meets these prices he finds in the field, don't you?

Mr. Withrow: I do not want to show that, and I want to note an exception to the fact that Your Honor would not let me complete my statement. Several times this morning I have been interrupted. Although we have been thrown off the record—

Trial Examiner Norwood: Now, let us get this clear. The Trial Examiner does not interrupt. The Trial Examiner interposes, and he has a right to interpose. It is his duty to interpose.

Read that question.

Mr. Wooden: I direct Your Honor's attention to paragraph (26) of the stipulation.

(Last question read.)

39223 Trial Examiner Norwood: Objection sustained, on the ground that the matter has been covered.

Mr. Withrow: Well, it has not been covered, if Your Honor will look at paragraph (26) of the stipulation, but I will offer to prove at this time that this witness would testify, if permitted to do so, that the prices which he finds quoted in the field put a ceiling on the prices at which he can sell cement, and that this form of price competition keeps him from raising his prices at will.

By Mr. Withrow:

Q. Have you ever wanted to raise your prices, Mr. Blair?

A. Yes.

Q. And have you been able to do so when you wanted to?

A. Not always.

Q. Would you tell us your reasons why you were not able to do so?

A. Competitors quoted a lower price, and we had to either meet those or stay out of the market.

39224 Q. Now, you used the term "price cutting." Would you tell us on the record what you meant by that?

A. Those are what might be termed secret or confidential prices, which are never secret for very long at a time.

39226 The witness identified Resp. Ex. 3008 as a Monolith notice to dealers, dated December 14, 1936; Resp. Ex. 3009 as a Monolith-Midwest statement or notice to all dealers, contractors and cement purchasers, dated January 31, 1937; Resp. Ex. 3010 as a Monolith notice to dealers, dated February 18, 1937. They were sent in by two of Southwestern's salesmen. On Resp. Ex. 3010 there is a handwritten note to him from Mr. C. F. Brandt, who was at that time a Southwestern salesman in Arizona. The notation on Resp. Ex. 3009 under the signature was in his own handwriting indicating that he sent a copy to

39227 Mr. Partridge. The handwriting in the upper right hand corner is a notation by Mr. Liebriech, in the witness' office, that this came in from Mr. Simpson, Southwestern salesman at Albuquerque, New Mexico; on Resp. Ex. 3008 there is also a notation from Mr. Liebriech that it came in from Mr. Brandt.

39228 (RESP. EXS. 3008, 3009 and 3010 were offered and received in evidence.)

By Mr. Withrow:

Q. Now, did you find—after these documents

39229 came to your attention, did your salesmen find and report to you any change in the pricing or marketing practices of the Monolith Company or the Monolith Mid-West Company, Mr. Blair?

A. These came out right after the Robinson-Patman Act was enacted, and immediately after that in the terri-

tory where this mill solicited business in our territory we found that they were making these off prices on particularly every contract that came up, or practically every contract that came up in the territory where we locked horns.

By Mr. Withrow:

Q. And by "off price," you mean a price that was below the lowest openly quoted market price?

A. Below the price that we had in the market. Of course, they had no price in there after these statements were submitted to the trade.

39230 Q. Did you find that either Monolith or Monolith Mid-West broadcast quotations to the trade after that announcement?

A. No, sir.

Q. Now, had your salesmen or you found in the field secret prices or special concessions or price cuts or special terms being given by any companies, including the Monolith Company—I mean, excluding, for the time being, the N.R.A. Code period?

39231 A. We found them off and on ever since I have been in the business, especially since the days of the depression.

By Mr. Withrow:

Q. Would you tell us whether or not your friendly dealers or contractors from time to time come to you and offer you the business if you will meet a concession offered to them?

Mr. Wooden: That is objected to as being covered by the stipulated testimony.

Trial Examiner Norwood: The objection is sustained.

Trial Examiner Norwood: You have shown that a great many times. Everybody here knows the answer.

Mr. Withrow: Well, if Counsel for the Commission is willing to concede that friendly dealers and con-
39232 tractors go to their source of supply for cement and offer them the business when other companies offer them concessions, either in price or in terms and conditions or special services, I will desist from this line of inquiry to the end of this case, both with this witness and all others.

And I would be very grateful for it. I have no desire to go into these matters when they concede them.

Mr. Wooden: I will concede that this witness may be taken to have already so testified.

Mr. Withrow: That is enough.

Trial Examiner Norwood: Read his statement.

Mr. Withrow: That satisfies me.

Trial Examiner Norwood: But the Counsel made some sort of a permanent suggestion there.

Read that over again. I will ask Mr. Wooden to pay attention to it.

(Statement of Mr. Withrow read.).

Mr. Wooden: I am willing to concede that other witnesses from other companies, Respondent companies, would so testify.

Trial Examiner Norwood: Go ahead.

Mr. Wooden: You cannot ask any more than that.

39235 By Mr. Withrow:

Q. Would you tell us, Mr. Blair, whether or not you maintain high prices around El Paso for the purpose of allowing competitors to come there and sell cement?

A. No, indeed.

Q. Have you ever had any understanding or agreement with regard to the price of cement?

A. No, sir.

39238 By Mr. Withrow:

Q. Do you exchange information with your competitors as to price changes or changes in policy?

A. No, sir.

Q. Do you ever consult with your competitors with reference to a bid to the Federal Government?

A. No, sir.

39240 Q. Have you ever agreed with your competitors to sell only on delivered prices, Mr. Blair?

A. No, sir.

Trial Examiner Norwood: Read that previous question, before this last one?

(Question read as follows:

"Q. Have you ever had any agreement with any of your competitors as to the method by which you would calculate or determine prices?")

Trial Examiner Norwood: I will reverse the ruling on

that and permit him to answer it. I think they are both covered, but out of an abundance of caution that may go in.

Answer that question:

A. No, sir.

39247 By Mr. Withrow:

Q. Now, Mr. Blair, I would like to call your attention to the third paragraph in Commission's Exhibit 1273-C and D. Do you recall the transaction there referred to?

A. Yes. This was one of the matters in connection with the testimony I made yesterday.

Q. Well, there, it refers in that letter to 80 cents a barrel profit. Is that correct?

A. No.

Q. Well, would you explain what you mean by it?

A. Well, that was the—merely the entire gross
39248 that we received above our selling price, or below, I should say, our selling price, and did not include a great many of the expenses that I was very faintly familiar with at that time. This was just about a year after I was made sales manager.

Trial Examiner Norwood: May I see that? Are you through with it?

(The witness hands the paper to the Trial Examiner.)

Trial Examiner Norwood: Well, he did not receive 80 cents a barrel profit?

The Witness: No, sir.

By Mr. Withrow:

Yesterday afternoon we talked about the three Conchas Dam contracts, Mr. Blair. You testified, I think on the second one that the Federal Government made the award on the basis of the delivered prices you quoted. Do you recall that?

A. Yes, sir.

Q. Now, did the freight rates go up after you entered into that contract with the Government on the second Conchas Dam order?

39249 Trial Examiner Norwood: And this is a case on the other side, where the freight rate went up, and he lost it; is that right?

Mr. Withrow: That is right.

Trial Examiner Norwood: He may say that.
The objection is overruled.
A. Yes, sir; went up one cent a hundredweight.

By Mr. Withrow:

Q. That is 4 cents a barrel?
A. Practically.
Q. Now, did you have any agreement with anyone to use the Institute freight rate books?
A. No, sir.
Q. Do you have any agreement with any of your competitors as to which mills shall be so-called base mills and as to what the so-called base price or price base will be?
A. No, sir.

39250 Q. Mr. Blair, I direct your attention to Commission's Exhibit 2742, Nos. 11 and 62, and ask you if the prices here which—both on shipments to Lordsburg, N. M.,—if the prices there reflect a general change in price, or if that change there is part of a general change in price at that time in and around Lordsburg, N. M.?
A. Well, to Lordsburg, yes, but it is brought about just merely by an increase in the freight rate.

39251 Q. Mr. Blair, I call your attention to the same exhibit we have just referred to, invoices Nos. 70 and 46, and ask you if they show a general change in prices at Albuquerque, N. M., from $3.38, in paper, to $3.46, in paper?
A. There was an increase shown here of 8 cents a barrel, yes.
Q. Now, invoice No. 78, which is on April 27, 1938, it shows a price in cloth $3.63, which would be the paper equivalent, would be $3.38, would it not?
A. Yes, sir.
Q. Now, could you explain to us whether or not that invoice represents a shipment on a contract which existed at the previously low price of $3.38?
A. Yes. The job is specified on the invoice.

39252 *Cross-Examination by Mr. Wooden.*

Q. Mr. Blair, can you tell us whether your invoice No. 78 in Commission's Exhibit No. 2742, was a shipment made on a contract entered into during the month of April, 1938?

A. I can't recall, Mr. Wooden, and I have forgotten the terms of that subpoena under which those were submitted. We attempted to follow the subpoena. If I knew that, that would be the only indication, however, but I can't recall what the terms were nor can I tell from this whether it was under contract made that month or prior to that.

Q. Didn't you understand the subpoena to call only for shipments made on sales or contracts made during the month of April?

A. I say I do not recall the terms of the subpoena at all.

Q. Now that I call that to your attention, wasn't that your understanding?

39253 A. I do not recall.

Q. Do you know whether or not any other of your invoices forming Commission's Exhibit 2742 also might have had in them some shipments on contracts entered into prior to the month of April?

Mr. Withrow: Same objection.

A. I do not recall any of the terms of the sub-
39254 poena, Mr. Wooden, and consequently I can't tell you. We attempted to comply to the letter of your subpoena, and did it to the very best of our ability.

By Mr. Wooden:

Q. Your testimony, then, is that you do not know whether or not in your invoices submitted in response to that subpoena you included any shipments on contracts made prior to the month of April?

A. No, I do not recall.

Q. Now, when did you resign from The Cement Institute, so far as your El Paso mill is concerned?

A. Last October or November, I believe.

Q. 1939?

A. Yes, sir.

Q. You did not join The Cement Institute, I understand, at El Paso, until the Code came on in 1933?

A. Just prior to the effective date of the Code; yes, sir.

Q. You were solicited to join at the time the Institute was organized, weren't you?

A. I don't know. That would have been directed to our Los Angeles office.

Q. You were in charge there at El Paso, weren't you, from 1927 on?

A. I was in charge of sales; yes, sir.

Q. And you do not know whether you were
39255 solicited to join the Institute in 1929 and 1930?

A. No, sir.

39257 Mr. Blair, you testified at considerable length in response to quite a number of questions put to you by your counsel that your mill at El Paso has never had any agreement, arrangement, or understanding with competitors regarding prices, the method of pricing, the use and establishment of basing points, the classes of trade to which you would sell direct, and the classes to which you would sell through dealers, practices involving terms and conditions of sale, and in general any competitive practice or condition you testified you never had any agreement or understanding; is that right?

39259 A. I do not recall testimony regarding the basing-point systems, but all of the others I testified to.

By Mr. Wooden:

Q. Didn't you testify just this morning that you never had any agreement or understanding with your competitors as to which places should be basing points?

A. Yes, sir.

Q. Now, in so testifying, isn't it a fact that your company paid $100,000 to the State of Texas in settlement of an anti-trust suit under the laws of the State of Texas in which you and your competitors in Texas were charged with violating the laws of Texas?

39263 A. Such a payment was made, Mr. Wooden, over the protest of our counsel and under the direction of the executives of our company, who felt that it was an economy of my time and theirs, and the expense of this suit, and it seemed to us that the State must have felt they had a pretty slim case when they accepted in the agreed judgment our denial of guilt and also accepted about one percent of the amount of the suit.

By Mr. Wooden:

Q. The total amount was $400,000, wasn't it?

39264 A. I think it was $500,000, Mr. Wooden. Two suits were involved.

By Mr. Woodeu:

Q. And how was the amount that you paid arrived at?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Objection sustained. I think we have gone far enough to bear on his statement there that he has never made any agreement.

By Mr. Wooden:

Q. Didn't you have an understanding with your co-defendants in that suit that you would pay a hundred thousand dollars?

A. I know nothing whatsoever, Mr. Wooden, of how the settlement was arrived at. That was handled entirely by our counsel.

By Mr. Wooden:

Q. Wasn't it divided equally among the co-defendants?

39265. A. It is my understanding from the accounts I have read of it, but to my knowledge I have no knowl- of it.

By Mr. Wooden:

Q. Wasn't there an agreement between you and your co-defendant competitors to settle the suit by the payment of the money that was paid?

A. I can't answer that. I was not down there when the settlement was made, and had nothing to do with it.

By Mr. Wooden:

Q. You do not know anything about it. It did not come to you through the officers of your company what the terms of the settlement were?

A. Only by hearsay.

By Mr. Wooden:

Q. You mean when the officers of your company—

A. Discussed it at various times, and newspaper accounts.

Q. Now, based on the information you got from the officers of your company, didn't you understand that there was an agreement with your co-defendants to settle the case by each of you paying a certain amount?

39266 A. I do not believe that I was told how the settlement was arrived at.

By Mr. Wooden:

Q. Well, was it your understanding from information your officers conveyed to you that the case was to be settled by each of the defendants paying a certain amount?

39267 A. I was told, and I also read, I believe, in the papers, that each of the companies—that is, four of the companies paid $100,000 and two paid $50,000. Now, how that was arrived at, I am not informed.

By Mr. Wooden:

Q. There was a charge of price fixing involved in the suit, was there not?

A. I believe there was. It has been a long time since I read the complaint.

Mr. Withrow: Your Honor, I am going to move to strike that question and answer also on the ground that it is not the best evidence. If he wants to put in what the complaint is, all right; but this is not the proper way to prove it.

Trial Examiner Norwood: Well, he wants to know what this witness knows about it, and what he considered when he made his answer denying any agreement, and that is all it is in here for. That is all it will be considered for. I think on cross-examination he has a right to probe him about that.

39269 Q. Mr. Blair, you testified you never had any agreements or understandings with your competitors with regard to what places should be basing points.

A. That is correct.

Q. Is that correct?

A. Yes.

Q. Well, you have had discussions, have you not, with competitors on that subject?

A. I cannot recall any.

Q. I call your attention to Commission's Exhibit 1276-A, B, and C, and particularly to C. That is a letter of yours, isn't it, to your Mr. Merrill?

A. The most of my discussion in this instance were with the dealers that were at the lumbermen's convention at Waco, from which that was—but apparently I said something to Mr. Baumberger there.

39270 Q. And who was Mr. Baumberger?

A. He is with the San Antonio Portland.

Q. This is your letter, isn't it?

A. Yes, sir.

Q. Have you discussed with your dealers the question of what mills should be considered basing points?

A. No. That is not what I said.

Q. Well, I understood you to mean that, but if that is not what you mean, all right. We will get it straight.

A. No. They were—the discussion of how that would affect the prices, as to whether they would be basing points or not was brought up by a number of the dealers and contractors when those new mills were started.

Q. Are your dealers familiar with which mills are basing points and which are not basing points?

A. I think some of them are.

Q. Is that unusual for dealers to know what mills are basing points?

39272 A. It is.

By Mr. Wooden:

Q. Can you name any of the parties that you referred to in Commission's Exhibit 1276-C, besides Mr. Baumberger, when you say you discussed the question, the matter of whether Atlas was going to put in a base at their new mill, when you say in talking with Mr. Baumberger and some others, who were some of the others?

A. I think Mr. E. P. Hunter and Mr. T. B. Brazelton, those are two that live there in Waco that I am pretty sure we discussed this with.

Q. Well, are you just saying that you probably did discuss it with them, or are you testifying to a recollection of having discussed it with them?

A. I can't recall definitely, Mr. Wooden, because, as I recall, that letter is dated back when?

Q. In 1929.

A. In 1929, 11 years ago.

Q. Do I understand that it is your testimony that you did discuss it with them, and you recall discussing it with them, or do you think you might have discussed it with them?

A. I remember discussing the cement situation with those two gentlemen. As to whether we discussed basing point or what not, my memory is not clear.

39273 Q. What was the source of your information that Atlas had not decided yet whether or not they would put in a base?

A. I think it was from Mr. Hunter, who is the head of

one of the largest line yards in Texas, and headquarters in Waco.

Q. Do you have a recollection that you got it from him?

A. That is my recollection; yes, sir.

Q. You did not get it from Mr. Baumberger?

A. No, sir.

Q. Or any other mill people?

A. No, sir.

Q. You are clear about that?

A. I am very positive.

Q. What was the idea in your talking with Mr. Baumberger, one of your competitors, about it?

A. I talk with any of our competitors whenever I meet them out socially that way.

Q. Well, did you discuss that with the Atlas people, themselves?

A. No, sir; I don't think I did. I don't recall having done that.

Q. While we are on that particular letter, Commission's Exhibit 1276-A, B, and C, do you say that there was no agreement reached with your dealers at the meeting, or as the result of the meeting that you describe there?

Mr. Withrow: Your Honor, I object. Agreement 39274 as to what? It is not material and relevant unless it happens to be concerning one of the matters in issue.

Trial Examiner Norwood: I think it is very clear.

Mr. Withrow: Well, it is not. This letter deals with about ten or twelve different subjects. I think it is a very unfair question.

Trial Examiner Norwood: He can bring out the question of whether there was an agreement, first, if he wants to. The objection is overruled.

A. I don't see any agreement in there, Mr. Wooden.

By Mr. Wooden:

Q. I did not ask you if you saw any in there. I say, do you testify that there was none?

A. Yes, sir.

Q. You say that notwithstanding the fact that you say in here that you enclosed a copy of the memorandum of the Dealers Association. You say in that letter, "It is exactly in line with the suggestions we discussed when you were here, and which you made to some of the other mills on the trip following your visit."

A. Yes, sir. That referred to a dealer policy which

was right in line with the policy that Mr. Merrill and I had discussed in El Paso.

Q. And which you say you "had made to some of the other mills on the trip following your visit"?

39275 A. I don't recall that incident at all, of Mr. Merrill's trip, with the other mills there.

Q. Well, it is your trip, the way I read it, the suggestion that you made to some of the other mills on the trip following Mr. Merrill's visit. Do you say there was no agreement, even though the dealer's proposal was exactly in line with the proposal you had made to some of the other mills; is that right?

A. I though you were reading the letter there that I wrote to Mr. Merrill.

Q. I am.

A. I notice that you are stating "you" there when the word is "I."

Q. I did not attempt to quote it.

A. I see.

Q. You made, you say, those suggestions to some of the other mills.

A. I can't recall a thing about what they were, nor what that refers to.

Q. Well—

A. Was there a memorandum with that?

Q. No; you said you enclosed a copy of that memorandum, but I do not know what that is. You say there was no agreement with the dealers, although you say in this letter that the last paragraph pertaining to truck "does not affect us at El Paso, as we only permit this in cases of emergency."

39276 A. That is correct.

Q. You went on to say it affected Trinity and Lone Star, "and Trinity would not give any answer to that phase, as Mr. Ulrickson was not at the meeting." What was the paragraph or the proposal regarding the trucking which you refer to there?

A. I don't recall any of the outline of the memorandum that is mentioned there, and I have searched for a copy of it, and we have never been able to locate it.

Q. How long did that continue to be your policy with regard to trucking at El Paso, when you say you permitted it only in cases of emergency?

A. Until the new poligy, as I recall it, was put in in Arizona.

Q. And when was that?

A. I can't recall.

Q. Not even approximately?

A. No, sir. The price lists that were introduced in evidence, as I recall—some of them show when that started, but I have not examined those in a year or more to see when it started.

Q. Now, after that paragraph about trucking, you say in this letter: "I am mighty glad that this is brought up as it is going to have a very good effect in helping straighten out the cement situation in Texas."

What did you mean by that?

39277 A. I don't recall. I don't recall what was referred to. As I say, I do not recall anything in the memorandum.

Q. You do not have any recollection as to what the situation in Texas was that you would like to see straightened out in that proposal of the dealers?

A. No, sir.

Q. You testified, did you not, Mr. Blair, at considerable length in the so-called Texas suit?

39278 A. Yes, sir; I testified.

By Mr. Wooden:

Q. Now, I show you Commission's Exhibit 2951-P, for identification, and ask you if you did not testify, as shown in that paper—

Mr. Withrow: Just a minute.

By Mr. Wooden:

Q. (Continuing) —in the Texas case?

39281 A. Does this—I cannot tell from this whether that refers to that, or what testimony it refers to.

39282 By Mr. Wooden:

Q. It does not refer to the exhibit that I was calling your attention to; it does not. It refers to the general subject of your relation with dealers.

A. Well, that may be—

39283 Q. I show you page 1072 of the transcript of your testimony in the Texas case, and you can look at it in its context or any way you like, and I ask you if you did not so testify there, as shown on that page?

Mr. Withrow: May we have the document marked for identification before it is shown to the witness?

Trial Examiner Norwood: Yes. Let is be marked.

(Page 1072 of the document referred to was marked for identification "Commission's Exhibit 3248.")

Mr. Withrow: What is the question now?

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Withrow: Your Honor, the document which the witness has in his hand, and which has been marked as a Commission's exhibit, has not yet been identified in any way, shape, or form, and I object to the question specifically by Mr. Wooden characterizing and stating what the document is. There has been no identification, no showing that that is the trar script, and until there is such a showing we object to it.

Mr. Wooden: Couldn't I ask you to waive identification, like you have asked me?

Mr. Withrow: You could, but you haven't.

39284 Trial Examiner Norwood: The objection is overruled, and I take it Counsel is trying to identify it now.

Proceed.

Answer the question.

Mr. Withrow: Well, ask him to identify it.

Trial Examiner Norwood: Let him answer that question, please.

Counsel is out of order.

Mr. Withrow: May I make a statement?

Trial Examiner Norwood: No.

Mr. Wooden: I asked him if he did not testify as shown there.

Trial Examiner Norwood: Answer the question.

A. This looks like my testimony; yes, sir.

By Mr. Wooden:

Q. Now, isn't a matter shown on Commission's Exhibit 2951-P, for identification, a correct copy of the testimony that you gave as shown on Commission's Exhibit 3248, for identification?

Mr. Withrow: I object on two grounds: First, the documents, themselves, will show whether it is a correct copy, one or the other; and, second, there is still no proof on the record that that is a correct transcript of the record of the hearing. The witness' testimony was it looked like it, and that is not proper identification.

Trial Examiner Norwood: The objection is overruled.

39285 A. This appears to be what is in your brackets here, but from the question prior to this it seems that that referred to matters that were discussed in those policies that were established in 1935 and on which I testified yesterday or the day before.

By Mr. Wooden:

Q. Well, your testimony, however, has been to the effect that you had no agreements at any time with your dealers.

A. That is correct.

Q. Now, I will ask you if you did not testify as shown on Commission's Exhibit 2951-P, for identification, that the dealers made some concessions and the manufacturers some concessions, it was a matter of give and take, and that finally you arrived at a conclusion?

A. That is right, but—

Mr. Withrow: Your Honor, I object to that. I would like to have an objection to the entire line of attempting to read into the record a portion of the Texas case. I have previously stated my grounds, and I won't object on that basis again.

Trial Examiner Norwood: Counsel has an exception to the entire line.

Mr. Withrow: But I also would like to object specifically to this, Mr. Wooden purporting to read from a document not in evidence, and not correctly read-

39286 ing even the document.

Mr. Wooden: I will offer the exhibit, Commission's Exhibit 2951-P, for identification, Your Honor. It was identified by the official reporter who took the transcript of testimony in the Texas case.

Trial Examiner Norwood: Well, did this witness identify it?

Mr. Wooden: This witness has said it is a correct copy of what appears on the page, Commission's Exhibit 3248, for identification.

Mr. Withrow: Yes, Your Honor, but you have to go back to the basic document. No one has identified the original document. To just say that this is a correct copy of some other document, then it depends upon whether the original document from which the copy was made is correct.

Trial Examiner Norwood: I want to inform counsel its acceptance would not necessarily be based upon its being a copy of any document. He could read them verbally and ask if he said that.

Mr. Withrow: That is right, but if he did, and he purported to do that a minute ago, he should read it verbatim, and that is my objection.

Trial Examiner Norwood: If this is in the record there it shows whether he quoted it correctly or whether he did not.

39287 Mr. Withrow: Oh, I object, I renew all the objections which we have heretofore stated to that document which included an absolute lack of identification, and, furthermore, that they are incompetent, irrelevant, and immaterial, and Your Honor excluded them previously on the grounds of improper identification, and no new identification has been added since that time.

Mr. Wooden: Don't repeat the misstatement, Mr. Withrow, that you previously made, that His Honor excluded them. He did not. He withdrew them.

Mr. Withrow: His Honor recalls having excluded them.

Mr. Wooden: The record will show.

Trial Examiner Norwood: I am not sure whether they were excluded or whether they were withdrawn. I think I made myself clear on that, and I think the best person in the world to identify testimony that they have given somewhere else is the person that gave that testimony. I do not know any better identification that could possibly be obtained.

Now, do you offer that one page, is it?

Mr. Wooden: Yes, Commission's Exhibit 2951-P.

Trial Examiner Norwood: I should like to look at it.

(Mr. Wooden hands the document to the Trial Examiner.)

Trial Examinr Norwood: The entire page?

39288 Mr. Withrow: Of course, Your Honor realizes when he says the entire page, that is not the page of the original transcript. This is portions which Mr. Wooden has selected out of some document.

Trial Examiner Norwood: Yes, that is correct.

Mr. Withrow: And he does not even have all of the consecutive questions and answers in this paper. It violates the rule of verbal completeness, and we add that to our specific objection.

Trial Examiner Norwood: Yes, we had it up before, I recall. That sounds familiar, but this page here, as I understand it, the witness has identified the entire page, has he not?

Mr. Withrow: No, he has not even been asked to.

Trial Examiner Norwood: What parts?

Mr. Withrow: Well, it is the portion that follows—

Trial Examiner Norwood: Below the stars?

Mr. Wooden: Below the stars there. I was directing his attention to,—that is all the page that I now offer.

Trial Examiner Norwood: The objection is overruled, and the paper marked "Commission's Exhibit 2951-P," for identification, is received in evidence with the exclusion of the first three typewritten lines above the row of stars.

(COM. EX. 2951-P was offered and received in
39289 evidence.)

By Mr. Wooden:

Q. Now, Mr. Blair, is it your testimony that you never had any agreement with dealers even though the manufacturers conceded some things and the dealers conceded some things, and you finally arrived at a policy, as you testified?

A. Yes, sir. Yes, sir. I think that if you will look at my testimony with regard to that policy which you stated I might use, the context is one of the things that was under discussion in the part included in the stars here, and will show what I was talking about in that instance.

Q. Do you have any explanation to offer that would change your testimony, as I called it to your attention?

A. Which testimony?

Q. Your testimony in the Texas case to which I called your attention?

A. No, not at all, if you will take it all.

Q. Isn't it a fact that dealers in Texas have brought to your attention their objections to having shipments made to towns other than the ones in which the purchasing dealer was doing business and had a yard?

A. Yes, that is correct.

Q. Hasn't that subject been discussed at meetings that you have attended with representatives of the dealers' associations?

39290 A. Yes.

Q. And you have your policy—your policy has

been in line with the wishes of the dealers in that respect, hasn't it?

A. As I recall, that has been our policy, Mr. Wooden, ever since I have been connected with the El Paso plant.

By Mr. Wooden:

Q. In other words, your policy has been in line with that desired by the dealers as expressed to you by them?

A. In some instances—

Q. And in line with the discussions that you have had with them; isn't it?

A. In some, yes, and in some no.

39291 Q. Well, it is your policy, isn't it, not to ship to a dealer except to a point where he has a yard, isn't that true?

A. As a general practice, that is correct.

Q. When you testified this morning that dealers usually did not compete in each other towns, as a matter of fact you won't let them compete in each other's towns, as far as you are concerned, will you?

39292 A. No, we have no control over that.

By Mr. Wooden:

Q. Well, you exercised control over that when you won't permit shipment to a dealer at a town where he does not have a yard, don't you?

A. No. I think we are a little at a different viewpoint, Mr. Wooden. What I mean is that for instance a dealer in Clovis certainly—it is practically physically impossible for him to compete with the yard in Amarillo, or a man in Albuquerque, it is impossible for him to compete

39293 with a man in Santa Fe or in Gallup, and that I think is very clearly understood.

Q. Well, didn't you testify in the Texas case that you attempted to enforce a policy of not shipping into another dealer's territory on the part of a dealer who did not have a place of business at the point of destination?

A. I may have so testified.

Q. Well, it is a fact, anyway, isn't it, that that has been your policy?

A. That has been our policy, as I say, ever since I have been with the company.

Q. Have you had cases where dealers requested such shipments?

A. Very few.

Q. And you have declined to make them, when requested?

A. In some cases; yes, sir.

Q. Isn't that done in order to protect the dealer at the town to which shipment is requested from the competition of the other dealer?

A. It is done to protect what we consider our own individual company's business interests.

Q. And your own company's individual interests are tied up pretty intimately with the wishes and the good will of your dealer customers?

A. Yes. If we did not have any dealer good will, we would not have any dealer business.

39294 Q. And this policy tends to create good will on the part of your customers who oppose that?

A. We hope so.

Q. Who oppose that shipment, that kind of shipment.

Now, with regard to this matter of your meeting with dealers to discuss the importation of foreign cement into Corpus Christi, you also met with some of your competitors on that same subject, didn't you?

A. As I recall, we were all together in this meeting called by the dealers to discuss that situation; yes, sir.

Q. What other mill representatives were there?

A. Well, I can remember Mr. Boyce, of the Universal-Atlas, I believe, Mr. Oldham, of the Lone Star, I do not recall for certain who else were there.

Q. Was that a meeting in Corpus Christi?

A. No, it was in Waco, if we are talking about the same instance.

Q. That was along in April, 1936, wasn't it?

A. That sounds right.

Q. Isn't it a fact that after you and your competitors discussed it with the dealers that you and your competitors continued to discuss it after the dealers left?

A. I do not recollect the details of it, because I was not particularly interested in the market other than from the connection of the former dealer that we had at Corpus Christi.

39295 Q. Wasn't it decided after the dealers left among you and your competitors that each of you would get together all the information they could as to how foreign cement competition in Corpus Christi and other Gulf ports might be best combatted?

A. I do not recall, Mr. Wooden. If you show me anything to refresh my memory on that, I might be able to recall something about it, but as I stated it is a market that we were not interested in, and consequently I paid very little attention to it.

Q. And it was in that connection that you wrote to your Los Angeles mill for information as to how they had handled the same question out there?

A. That is correct. I remember that very distinctly.

Q. And you were passing that on although you say you had no direct interest in the matter at Corpus Christi?

A. Yes, sir.

Q. You were doing it for the benefit of the others concerned, then, rather than yourself?

A. Mr. L. D. Garrison, largely. It was at his request that I sat in at that meeting.

Q. Well, I call your attention to Commission's Exhibit 1951-A and B, particularly the last paragraph of the letter, which is the letter of Mr. Boyce, and I ask you if that does not refresh your recollection about what oc-39296 curred at the meeting after the dealers left?

Mr. Withrow: Did you say this was a letter by Mr. Boyce?

Mr. Wooden: Yes.

A. No. The only thing it recalls, one more man that was in the meeting that I mentioned a few minutes ago.

By Mr. Wooden:

Q. Who is that,—Mr. Cox?

A. Yes, sir; but as far as any other details about that, it does not refresh my memory at all because, as I say, it passed from my mind since we had no direct interest in it.

Q. You do not consider such activities between you and your competitors with your dealers as having anything—being anything in the nature of an agreement among you?

A. No.

Q. Or understanding?

A. Most certainly not.

Q. Don't you consider that you were working together for a common purpose?

A. Well, I think we were entitled to accede to a customer's request on one particular thing without it evidencing any agreement, particularly with reference to that, or our competitor.

Q. Well, you were working together, weren't you, with your competitors?

39297 A. Well, I was in the meeting, but, as I said, I was working and doing that at the request of Mr. Garrison, a former customer of our company.

Q. Was any special price put in at Corpus Christi to meet foreign cement competition?

A. I could not tell you.

Q. You attended several meetings, didn't you, at which the situation was discussed with regard to foreign cement at Corpus Christi?

A. I think I attended one other meeting in the same year when I happened to be in that part of the State, but I am not certain about that.

Q. I believe it is your testimony that you do not recall a bit or single thing as to how the situation was handled in Los Angeles, but as reported to you on your request by Mr. Partridge.

A. No, I do not remember—I testified that I do not recall a thing that was on the memorandum that he sent me.

Q. Well, tell us independently of that all you know about how it was handled in Los Angeles?

A. Well, as I recall,—and this is just some casual reports when I have been in Los Angeles—

Mr. Withrow: Your Honor, I object. It now appears that the testimony of the witness would be hearsay, and I do not think we should waste time in the hearing

39298 on hearsay. This is beyond the scope of the direct, also, and this witness has nothing to do with any sales in and around Los Angeles. It is outside his territory completely, and I do not think we should waste time.

By Mr. Wooden:

Q. Were those reports from your officers of your company in Los Angeles?

A. Discussion with them; yes, sir.

A. The only thing that I can recall now is a specification that was in the—I believe the Building Code of Los Angeles with regard to the shipment of cement by water had to be in double-walled bags; that is, one wall of cloth and one of paper, and separated by an asphalt seal of some kind, so that the material might come in entirely uncontaminated by moisture and that is all that I can recall of their telling me of the situation in Los Angeles.

By Mr. Wooden:

39299. Q. And they got behind the adoption of such a requirement there?

A. Well, I don't know where the practice eminated or how it was handled. I had nothing whatsoever to do with it, and I do not know how it was handled.

Q. Don't you know that your company got behind the adoption of that requirement?

A. No, I do not know that.

Q. How was it handled in Corpus Christi?

A. I couldn't tell you. I never did follow it up at all.

Q. You were interested enough to attend several meetings and you never found out how it happened; is that it?

A. I attended meetings when I was in that neighborhood, but I never made a special trip for that purpose, and, as I say, I did not follow it up, because we were not interested in the market.

Q. You attended a meeting on the same subject, did you not, even after you wrote that you were not interested and were not going to attend any more meetings?

A. When was that?

Q. In 1936.

A. Well, I will tell you this, that I did not attend any special meeting on that. I might have been there in connection with some other meeting.

39300 Q. Is not that the situation with regard to Commission's Exhibit 1275-E and F, in the third paragraph (handing documents to the witness)? Did you not say that you were going to attend another meeting on this subject?

A. If you will read the first sentence of that letter, or that paragraph there, you will see I went down there—

Q. Yes; but did you not at the same time announce your intention of attending a meeting of the Texas mills regarding foreign cement?

A. I say, I may have done that in connection with some other business trips, and not for that special purpose.

Q. Did you not tell the other mills that because of your lack of interest in the subject you were not going to make any more trips to attend meetings about it?

A. I am pretty sure I told them that.

Q. As a matter of fact, did you not thereafter attend such a meeting?

A. Not on any special trip.

Q. Well, whether on any special trip or not.

A. I may have attended it, Mr. Wooden, if it was in connection with some other matter, and that came up for discussion.

Q. I direct your attention to Commission's Exhibit 1275-I (handing the document to the witness). That is your letter of July 25, 1936. Did you not say that you returned from a trip that was particularly for the purpose of discussing that foreign cement situation at Corpus Christi?

39301 Mr. Withrow: What paragraph?

Mr. Wooden: The very first sentence.

Trial Examiner Norwood: What paragraph?

Mr. Wooden: The first sentence of the first paragraph.

A. It is my statement in the first part of it, but I do not recall anything about it, and I am trying to find out if there was not some other—I am sure there was some other reason that I attended, although I said that that was the particular thing that I went down there for, but I know I made no special trips down there on the Corpus Christi foreign cement situation.

By Mr. Wooden:

Q. How do you reconcile that statement that you now make with this statement in your letter that I just directed your attention to:

"I returned yesterday morning from a trip to San Antonio, which was particularly with reference to the foreign cement situation at Corpus Christi."

A. I cannot reconcile it, but I still am certain that I made no special trip for that. I cannot recall, though, just the reason for the trip, but there is bound to be another reason, or I would not have gone down there just for that purpose.

Q. You say in this exhibit that you were able to get considerable information regarding not only the situation there, but at some of the other Texas ports and

39302 from Mr. Story of the Trinity Company.

A. Yes, sir; correct.

Q. Although you got that considerable information, then, in July, 1936, are you unable to tell us any of it now, what the information was that you got?

A. Yes, sir. I remember particularly Mr. Storey's discussion was in reference to the situation in Florida, and,

as far as I was concerned, it was just a matter of general information on the foreign cement situation, with which I came in very little contact.

Q. That Mr. Storey is Mr. S. W. Storey, I take it?

A. Yes, sir.

Q. Was he then president of The Cement Institute?

A. I do not know.

Q. Did he become so a short time afterwards?

A. I do not recall when he was president. He was president at one time, I know, but I don't know when he was president.

Q. Now, have not attended a number of meetings with dealers, in company with representatives of your competitors?

A. I think nearly every time that I have attended these dealers' meetings in Texas, and I think I have attended each one of their annual meetings every year since 1927, with the exception of one year, I have always seen quite a number of our competitors.

Q. Have you not sat in meetings at which a lim-
39303 ited number of Texas dealers were present and discussed questions of trade policy?

A. Yes; I have sat in with the Texas Cement Committee. As I say, I do not recall which association that was from, whether it was the Texas Lumber Dealers, or the Texas Line Yard Association.

Q. What representatives of your competitors have you met at such meetings?

A. Well, at various times, I have met all of them.

Q. Well, name some of them.

A. I have met Mr. Boyce, Mr. Hayden, Mr. Cox, who was a competitor, at one time, Mr. Baumberger, Mr. Beck, Mr. Oldham, Mr. Thompson—at one time or another I guess there have been twelve or fifteen of them.

Q. Showing you Commission's Exhibit 1275-A, in which you refer to a meeting, in the second paragraph you state there that there were two meetings with representatives of Texas mills. Were the mills' representatives all together at the discussions that are referred to in your letter?

A. I don't remember. That is with reference to that same meeting; that, you see, is the Corpus Christi situation, and I don't remember. It seems to me that at this time there would be just one or two of us in there. There were several of those meetings where they called us in one at a time. I don't recall—

Q. In this meeting they discussed not only the
39304 Corpus Christi matter, but the question of who was entitled to recognition as a regular dealer; did they not?

A. Yes; that came up a number of times.

Q. What did you mean by your statement in this letter that "that subject would have to be worked out carefully and in an individual manner with each company"?

A. Because that was the only way we were willing to handle it.

Q. You mean you wanted to avoid the appearance of any agreement or understanding upon the matter?

A. No; that is not what I had reference to at all. I mean that we have always been the sole judge as to whether we would classify a man as a dealer or not, and it depended upon our own investigation.

Q. Why did you even think to state such a thing as it would have to be worked out individually and very carefully?

A. I don't recall, because, as I recall,—and I am not certain whether I stated it in that,—they had had no complaint against our selection of dealers.

Q. Well, that is all the more reason for my asking you the question, why in that particular case it had to be worked out carefully and individually?

A. Well, as I recall it, some of the mills were criticized by the dealers for their selection of dealers, and, if I am not mistaken, every mill took its own stand, and it
39305 could not be in any sense a matter of agreement.

Q. The dealers took a rather united stand, did they not?

A. Oh, yes; they did that many times and on many subjects.

Q. Did you understand that the Compendium of The Cement Institute, to which you referred in your direct examination, was in the nature of a new Code of Ethics following the cancellation of the N. R. A. Code?

A. No; I don't remember receiving it or paying any attention to it until this case came up.

Q. Well, is it your testimony that you did not regard it as in the nature of a new Code of Ethics?

A. Yes, sir. I don't recall paying any attention to it, either when it came out or later.

Q. Did you not testify in the Texas case that you did

understand that the Compendium was a continuation of the old Code and a new Code of Ethics?

A. I don't recall my testimony in that particular. I know there was one of those documents that Mr. Boulden questioned me on at considerable length. I do not know whether it was that or not. My recollection is that I
39306 had said that that was just a continuation of the practices that we had had in effect for a great many years, both before and after the Code.

Q. Now, I direct your attention to Commission's Exhibit 2953-H, for identification, and ask you if you did not testify that it was your understanding that the old Code was continued under this new Code of Ethics, meaning the Compendium (handing a document to the witness)?

A. This does not mention the Compendium at all, Mr. Wooden, and I do not know whether that is the same thing that we were talking about or not.

By Mr. Wooden:

Q. Can you explain what it did refer to, if not the Compendium?

A. No, I cannot, because it only says here, "Under this New Code of Ethics," and I don't know—

Q. That is your testimony?

A. That is my testimony; yes, sir. You will note here that I say I have not read it, but it was my under-
39307 standing that this was continued.

Q. Now, I call your attention to your testimony on the same page, and also on the preceding page; Commission's Exhibit 2953-G, for identification, and ask you whether the Trade Practice Committee rules that were put out by The Cement Institute, according to your testimony, were not the Compendium that I have asked you about?

A. The only thing that makes me doubt it is this statement here of Code of Ethics. There have been two or three of those things out, and I am not certain what we were talking about right here on that page. I am under the impression that there was a Code of Ethics, as well as a Compendium.

Q. A new Code of Ethics used by The Cement Institute?

A. That was my understanding.

Q. Other than the Compendium?

A. That is my impression, Mr. Wooden. As I say, I was hazy, and, as I said in that testimony, I had not read it,

and if I had it had been so long ago that I had forgotten about it.

Q. And do you recognize Commission's Exhibit 2953-G, H, I, and J as a correct reproduction of your testimony in the Texas case (handing the document to the witness)?

A. Well, I do not recognize it in this form, Mr. Wooden, and on 2953-I there is apparently something else left out in there, so I do not know what that refers to.

Q. Will it let you if I show you the complete
39308 transcript in the Texas case, covering the same portion of your testimony?

Mr. Withrow: Can we have it marked, please?

Mr. Wooden: Let it be marked.

Trial Examiner Norwood: All right.

(The volume containing the testimony referred to was marked for identification "Commission's Exhibit 3249.")

By Mr. Wooden:

Q. What I am showing you has been marked for identification "Commission's Exhibit 3249," and I am directing your attention to pages 1302 to 1312, inclusive, and I will ask you if you recognize that as a portion of your testimony in the Texas case (handing the volume to the witness)?

A. From this it would seem that the Compendium was in the articles—in the same book with the articles of incorporation of the Institute.

By Mr. Wooden:

Q. That is true.

A. But I had forgotten until I reviewed this testimony.

Q. But I am asking you whether you did not testify in the Texas case that the Compendium was a continuation of the old N. R. A. Code, and that the Compendium of the Institute was a new Code of Ethics?

A. Well, I do not recall just how I stated that. Isn't it in this?

39309 (Mr. Wooden hands the transcript to the witness.)

The Witness: Yes. I see there that that was the understanding. It was the old Code was continued under the new Code of Ethics.

By Mr. Wooden:

Q. And the old Code, you mean the N. R. A. Code, and by the new Code, you mean the Compendium?

A. If that is in the same book that I am referring to there, as I say, I have not seen that for years, Mr. Wooden. I think I did see it when I was on the stand in Los Angeles a little over a year ago, but I haven't looked at it since.

Q. When you say "it," you mean the Compendium?

A. Those articles of incorporation, if that includes the Compendium in it. I am not clear in my mind. I have seen two or three things on that. I cannot recall what it was.

Mr. Wooden: Will you mark this as Commission's exhibit, for identification.

(The document was marked for identification "Commission's Exhibit 3250.")

By Mr. Wooden:

Q. Didn't you testify in the Texas case that you were still attempting to follow the Trade Practice provisions in the Compendium?

A. I think that I stated that we were following those practices which had been in effect both before and after the code. As I say, there was quite lengthy examination on one of these matters. Now, whether that is it, Mr. Wooden, it is hard for me to recollect.

39310

Q. Can you specify any practice contained in the Compendium that you were not following?

A. No, I cannot recall any practice that is in the Compendium.

Q. I am showing you a paper marked Commission's Exhibit 3250, for identification, and do you recognize that as copy of a letter you wrote and about which you were questioned in the Texas case?

A. Yes. I remember this, and that was in the part of the testimony that I had just read.

Q. To whom was that addressed and sent?

A. Sent to our salesman, Mr. A. P. Magruder in San Angelo.

Q. Were you referring in that letter to the Compendium of The Cement Institute?

39312

(COM. EX. 3250 was offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Blair, when you refer in this document, Commission's Exhibit No. 3250, to the trade practice provisions put out by The Cement Institute, which you were attempting to follow, you meant the Compendium, did you not?

A. I am under the impression that that is what I referred to, although, as I say, it is a little hazy in my mind, but I would like to call your attention to the statement I make in the second paragraph.

Q. Yes. With reference to that, on this matter of warrants, will you explain just what that means?

A. Those were time warrants, and sometimes they had an indefinite date of payment, and Mr. Merrill had told me at one time that he did not like to have anything of that nature, if he could help it; because he considered them "Just a lot of dogs and cats," to use his own expression with regard to this kind of paper.

Q. Well, the use of those warrants had the effect, 39313 did it not, of extending the time terms of payment beyond the regular time terms used?

A. It gave a very elastic extension, Mr. Wooden, in some of them. We have had a few of them where we have had a sweet time getting the money.

By Mr. Wooden:

Q. And in some, where you did not get the money, according to the terms of the warrants—

A. That is right.

Q. —it was still beyond the regular discount terms as to time?

A. Certainly. That is what I referred to in that last paragraph of the exhibit.

Q. Now, Mr. Blair, I want to return for a moment to that foreign cement subject and your letter and your statement on the stand a few moments ago that you re- 39314 membered the conversation with Mr. Storey about the situation regarding foreign cement in Florida. What information did you get from Mr. Storey regarding the situation in Florida?

39315 Mr. Wooden: Your Honor, there is an exhibit in evidence, the particular portion of which I did not bring out from the witness on the stand, and I can give you the number of it—it is Exhibit 1951—to the effect that it was decided at a meeting in which this witness was present that each would endeavor to get together all the data possible to combat that foreign cement proposition. Following that decision, this witness attended meetings, and information was produced describing how they handled it in Los Angeles, and his letter, which I called his attention to, stated that he had a conversation with Mr. Storey

about how it was handled in Florida, or about the situation in Florida. I understood him to say that he remembered that talk with Mr. Storey, and I am asking him what it was.

Mr. Withrow: I would like to point out that the letter, Commission's Exhibit 1[illegible], that Mr. Wooden referred to is, as Your Honor recalls, not a letter written by this witness. It was by Mr. Boyce.

Trial Examiner Norwood: I think he may tell us what Mr. Storey said. The objection is overruled.

A. Well, I was quite surprised at the information
39316 I got from Mr. Storey regarding the situation in Florida, as I had been under the impression that all, or at least most of the cement that was coming into Florida was coming in from Belgium, and it was the first time that I had heard that Danish and Norwegian cement was coming into that market, and that is all that I remember of his discussion of the Florida situation. It was just a piece of information that I had not gotten regarding a situation that I was not very closely in touch with.

By Mr. Wooden:

Q. Did you learn how they were meeting that situation in Florida?

A. No, sir.

Q. Now, you have testified that you find these secret price cuts off and on. What do you mean by "off and on"?

A. Well, it is a good deal like these revolutions in Mexico. They spring up every once in a while all over the country, Mr. Wooden.

Q. And you get information regarding such things through your salesmen or through dealers and contractors?

A. Yes, sir.

Q. Have you not found it frequently the case that such claims were such that you hesitated to rely on them?

A. Sometimes we felt like we were being "worked"; yes, sir.

Q. And frequently you did not act upon them because you doubted the accuracy or authenticity of the re-
39317 port; is that right?

A. Sometimes that was the case; yes, sir.

Q. Now, when you talk about secret price cuts, you mean, do you not, cases where your competitors are said to be making delivered prices that are less than the equivalent of the lowest combination of base price plus freight?

A. That would be lower than the price we were making in that market; yes, sir.

By Mr. Wooden:

Q. In other words, it would be lower than the lowest combination of base price plus?

A. Yes, the lowest price that we knew of in that market; yes, sir.

Q. With the exception of such reported secret cuts, do you know of any published prices lower than the lowest combination of base price plus freight?

A. Well, we have one of those in effect at the present time, as I recall.

Q. Where?

A. In western New Mexico.

Q. One point or over a whole?

39318 A. Two or three points.

Q. Any others in your sales territory?

A. I cannot recall any right at the moment.

Q. Aren't these secret price cuts that you refer to very largely reports of cuts to contractors as distinguished from cuts to dealers?

A. We get the information a little better from the contractor, I think, than the dealers.

Q. You do not get many such reports from dealers, do you?

A. Not a great many; no, sir.

Trial Examiner Norwood: Well, wouldn't the dealers report these to you right away?

The Witness: Sometimes they do not. We have got one incident in mind right now where we are trying to dig it out, but we haven't been able to do it for a year.

By Mr. Wooden:

Q. On what percentage of your business would you say that reports of secret price cutting apply?

A. Right now it would be relatively small because there is very little contract business in that territory.

Q. Well, during the period since 1935, what would you say?

Mr. Withrow: Your Honor, I object to going into these matters subsequent to the complaint.

Mr. Wooden: 1935, I said.

Mr. Withrow: Well, since 1935 certainly includes

39319 1938, 1939, and part of 1940, Mr. Wooden.

Trial Examiner Norwood: The objection is overruled. Confine your answer to the time prior to July 2, 1937.

A. I have never attempted to compile any figures on that, and I would not even be able to hazard a guess.

By Mr. Wooden:

Q. As much as 5 percent?

A. Well, as I say, I would not like to hazard a guess, because it would be purely a guess, and it would vary so from year to year; there are some years that I imagine it would be considerably more than five, some maybe not five percent. It would depend on the conditions, as I say, from year to year.

Q. If you separate the dealer business from your contractor business it would even run much less than five percent, wouldn't it?

39320 A. You mean if you eliminate the dealer's business, would the business on which cut prices would be more than five percent of the remainder?

By Mr. Wooden:

Q. No, I am taking the dealer business by itself, ignoring the contractor's business, wouldn't the percentage of cases where cut prices are reported be less than five percent?

A. It would probably be less than five percent of the dealer's business.

By Mr. Wooden:

Q. On contractors, it might at times run more and at times less?

A. That is correct.

Q. Is that correct?

A. Yes.

Q. What is the date on which you made the last change in the El Paso base price?

39321 Q. Prior to July, 1937.

A. I cannot recall.

Q. Hasn't that base price at El Paso existed without change for many years prior to July, 1937?

A. I do not recall, Mr. Wooden; there have been several changes, but whether they were all before or after July, 1937, I would have to go into my records which I do not have with me.

Q. Can you recall some other price at your El Paso mill than $2.15 stripped?

A. Yes. I think at one time it was $2.40, I think it was later $2.25.

Q. Can you fix the time?

A. No. That was prior to July, 1937.

Q. Over how long a period of time did this $2.15 price exist?

A. I cannot recall. I do not remember when it was put in.

Q. Beg pardon?

A. I do not remember when it was put in.

Q. Did it exist, or was it in effect when you went in charge in 1927?

39322 A. I do not recollect. I know it did not apply locally; whether it applied to all the territory I cannot say.

Q. Didn't your $2.15 price exist for five years or more without change prior to July, 1937?

A. It may—

The Witness: It may have been in as long as five years, Mr. Wooden. I do not recall.

By Mr. Wooden:

Q. Without changing?

A. That is what I mean, yes.

Q. Did you have at any time two base prices at El Paso?

A. Yes, sir.

39323 Q. When and what were they?

A. There has been a different base in Arizona for, I think, a good many years.

Q. What is it?

A. I do not recall. I think—you mean prior to July, 1937?

Q. That is right.

A. I do not recall whether it was $1.50 or $1.90. There have been several prices over there, $1.50, $1.70, $1.90. At one time it was the same as we had for the other territory.

Q. Well, you got different mill nets, did you not, out of your Arizona business?

A. Yes, sir.

Q. Even at that time?

A. Yes, sir.

Q. Even while you had this base applicable to Arizona?

A. We would get a different net if we went over beyond where the freight rate net.

Q. Well, you—what was the difference between your base price which you say you had applying to Arizona and the way your mill net fluctuated in eastern Texas territory when you went out of the territory controlled by your own base?

39325 A. If I understand that correctly, our bases would remain at a certain figure while it was in, and the mill net that we would get in East Texas would go up and down like a washboard.

By Mr. Wooden:

Q. That is true with your $2.15 base price.

A. That does not have any bearing, Mr. Wooden, on the price that we get in East Texas.

Q. You net less than $2.15 on your East Texas business, don't you?

A. Oh, certainly.

Q. But you have already testified, as I understood you, that your mill net in Arizona fluctuated at the same time that you had a base price in effect applicable to Arizona?

A. I believe that it did, but not to any great extent, because when you get west of Phoenix, Mr. Wooden, we attempt to ship everything in that part of the State from our Victorville mill, because they have a better rate west of Phoenix than we have; consequently, there is very little business shipped from either of our mills in the territory where we have a freight disadvantage; consequently, our mill net for the State of Arizona would always remain more nearly at the level of our mill base than any other territory that we have. That is the only territory where we have a control.

Q. Are you speaking now of Victorville?

A. Yes, sir.

39326 Q. Victorville?

A. Yes, sir.

Q. Your mill net from El Paso varied in Arizona?

A. That is just what I was trying to explain.

Q. Of course, in the territory where you did sell, I understand that Victorville did most of the selling?

A. No; you are wrong in that.

Q. I thought Victorville controlled by reason of the lower freight rate.

A. No.

39327 Q. Mr. Blair, I want to know how you reconcile your statement, if I understand your statement correctly, to the effect that in Arizona you had a lower base, and yet in Arizona, at the same time, you had a varying mill net for your El Paso mill.

A. I think, Mr. Wooden, you misunderstood—

Q. All right.

A. —the first part of the statement.

Q. All right.

A. When I told you that we had mill bases of a dollar and a half, a dollar seventy, and a dollar ninety, those were at different times. I don't think you probably got that. In other words, when the mill net is $1.90 for Arizona, there will be very little fluctuation in Arizona made in our mill net from El Paso for the reason that we do not go—our shipments do not go, as a rule, west
39328 of Phoenix, where we have to absorb the freight. I believe you did not catch the import of that.

Q. I thought I got that, but, nevertheless, you just now said that your mill net varied somewhat.

A. Well, it might; we might ship, for instance, one car or two cars, or maybe one little job, subject to a few cents freight absorption, which would affect it a fraction of a cent, or maybe a cent, or something like that.

Trial Examiner Norwood: Did you say something about selling on a price base of one of our mills and shipping from the other, and thereby changing your mill net?

The Witness: No; I did not intend to say that, Your Honor. What I attempted to say was that—you see, the rates in Arizona are divided at Phoenix, to all intents and purposes. Now, if the business is west of Phoenix, we will ship from Victorville, because we will have a lower rate from that mill. If it is east of Phoenix, we will ship from El Paso, because we have a lower rate from El Paso.

By Mr. Wooden:

Q. Then there are portions of western Arizona in which your El Paso base did not make the lowest combination?

A. Oh, yes, that is true—anything west of Phoenix.

Q. That was true during your sales managership there at El Paso?

39329 A. I believe so. I am not certain whether all of that is under the same condition. There was a blan-

ket put in for a certain contract. I think that is in the stipulation.

Q. Did any mill in California, or did any mills in Southern California, ever establish a base at your El Paso mill?

A. I have seen the correspondence on that. I never realized it, and I believe I stated that no mill had ever done that, but it seems that in some of the other testimony another mill had apparently done that, and I believe that was in the Burns and Clark questionnaire. I believe that one of the mills stated, in effect—

Q. That was Riverside?

A. I think that was the company—I had received my orders from the Los Angeles office, so I was not aware that it had been done by a competitor.

Q. Referring to paragraph (41) of your stipulated testimony, where did you get the information from that is contained in that paragraph about the number of stations (handing the stipulation to the witness)?

A. I believe our Los Angeles office checked that in regard to all the business in Arizona.

Q. How about the rest of it, as to the number of stations figured from El Paso?

A. I think that was all checked in our Los Angeles office, and the information furnished me.

39330 Q. Was that the information that was incorporated in the map shown as Respondents' Exhibit 103 for identification?

Mr. Withrow: Your Honor, I object to cross-examination on the basis of the map. The map was offered and rejected, and I think that should end it.

Trial Examiner Norwood: Sustained.

Mr. Wooden: Your Honor, I am asking what the source and basis of his information in this stipulated testimony is.

Trial Examiner Norwood: Oh!

Mr. Withrow: He has already given you that.

Trial Examiner Norwood: I may have misunderstood Counsel.

Read the question.

(Question read.)

Mr. Wooden: I will reframe the question.

By Mr. Wooden:

Q. Is any of the information contained in paragraph (41) of your stipulated testimony based upon or drawn

from the map which was marked for identification as Respondents' Exhibit 103?

39331 A. Mr. Wooden, the map does not contain anything like the number of stations listed in that paragraph. In other words, in our Los Angeles office, in making a check of those points, they took all stations, whether are open or prepay, and that was the basis of those figures. The map won't show anything like that number of stations for the reason that you could not get them all on the map.

39332 By Mr. Wooden:

Q. Is it your testimony that none of the information contained in paragraph (41) of your stipulated testimony is drawn from that map?

Mr. Withrow: The same objection.

A. That is correct.

Trial Examiner Norwood: Overruled.

A. (Continuing) Because you could not get those figures from the map at all, under any circumstances.

By Mr. Wooden:

Q. You have told us that the information in paragraph (41) was furnished by your Los Angeles office.

A. Yes, sir.

Q. And you did not have any part in making up that information?

A. No, sir.

Mr. Wooden: Your Honor, I move to strike paragraph (41) of the stipulated testimony on the ground it is incompetent and we do not have here the man who knows anything about the facts therein contained.

39333 Q. Now, Mr. Blair, with reference to your obtaining information from your customers, or otherwise, regarding prices being paid by your competitors or methods employed by your competitors, is it not your purpose in obtaining such information, so that you will be on an equal basis with your competitors and be able to make as favorable terms and at as low a delivered price to your customers as they?

39334 A. Yes, because we could not sell cement unless we did.

By Mr. Wooden:

Q. Is it not also your purpose in obtaining such information not to go below your competitors or give more favorable terms than your competitors?

A. Well, if we did that, it would not last very long.

Q. Then, your answer, I take it, is in the affirmative?

A. Yes, because I would say that we would have an apparent advantage until the information could be gotten to our competitors, and they would meet the situation.

Q. I take your answer to mean that you get this information with the intention of not going below your competitors in prices or more favorable terms; is that right?

A. Yes; I think it would be futile.

Q. Do you consider it competitive if a couple of athletic teams did no more than try to match and meet and not to beat the competition of their opponents?

39337 A. I think there is a great deal of difference, Mr. Wooden, in athletic competition and cement competition, and competition in a great many things.

By Mr. Wooden:

Q. Do you think it would be bona fide competition if athletic opponents did not do any more than try merely to meet what their opponents were doing?

A. No; I think that is an entirely different proposition, Mr. Wooden.

By Wooden:

Q. I think it is different, all right.

A. I believe—

Trial Examiner Norwood: But, now, substituting that—substituting the figure there, instead of the score made by a team, the prices made for a commodity by two different purchasers, could you call it competition

39338 when one met the price of the other,—call it price competition?

Mr. Withrow: Your Honor, could I have my objection to this entire line, including your questions as well as Mr. Wooden's?

Trial Examiner Norwood: Yes.

The Witness: May I answer, Judge, with another analogy?

Trial Examiner Norwood: Answer it any way you like, yes.

The Witness: Well, I believe that the boys here go across the street to get Coca-Cola now and then, and I believe that it is the same price in both of those several stores over there, and I think they are in competition with one another, just the same as we are with our cement,

when we are competing in a certain market at the same price.

Trial Examiner Norwood: I am asking you about price competition.

The Witness: Yes.

Trial Examiner Norwood: According to your concept of the word.

The Witness: I do not know whether you call it price competition, but I certainly call it competition.

Trial Examiner Norwood: Go ahead.

39339 By Mr. Wooden:

Q. Don't you consider that in the cement industry that you are familiar with, that the competition has been placed on a basis of service, personality, and friendship, instead of on the basis of price competition?

A. Yes, and I think the very nature of the business demands such a thing, or else you have a ruinous condition that none of us could exist under.

Q. Now, you have testified, Mr. Blair, that you have discouraged the loading of, or selling of cement for loading to dealers' trucks at your mill.

A. Yes, sir.

Q. How have you discouraged it?

A. We have told them that we did not want any more of that business than was absolutely necessary; some of them we have refused to load. We have tried to add premiums, we tried to accommodate some of them; we have to do it in certain territories to meet competition, but in every way we try to limit the amount that we ship by truck until we have—we feel that there is enough business in the territory to justify us equipping our plant for truck loading.

Q. When did you charge premius for such delivery?

A. I believe one letter was introduced in evidence showing that, as I recall, it was in January, 1936. Now,

39340 whether we did it prior to that I cannot recall; that was the only thing I have seen since I have been here on it.

Q. How much premium did you charge?

A. In that case, in that letter, it amounted to 25 cents.

Q. Did the other Texas mills charge a premium at that time?

A. I do not know.

Q. Could you charge a premium if they did not?

A. Yes, sir.

Q. Is that because you are there a long distance from the other mills?

A. Yes, we are over 600 miles from the nearest mill in Texas, Mr. Wooden.

Q. Well, do I understand that you have a somewhat different policy with regard to selling to trucks, selling for delivery by truck in your Texas business than you have from New Mexico and Arizona business?

Washington, D. C.
Friday, May 24, 1940.

39343 WILLIAM R. BLAIR thereupon resumed the stand and testified further as follows:

Cross Examination (Continued) by Mr. Wooden.

Q. Mr. Blair, I understood you to say something to the effect that you allowed truck deliveries to be made from your El Paso mill into New Mexico and Arizona by common carrier trucks. Is that correct?

A. Yes; some of the common carrier and some proprietary trucks.

Q. All of them have published rates?

A. Well; the proprietary trucks do not have any published rates.

39344 Q. You mean proprietary trucks owned by whom?

A. By the dealers.

Q. Are your delivered prices in New Mexico or into part of Arizona based on truck rates?

A. No, sir.

Q. Are the truck rates into parts of Arizona and New Mexico from your mill the same as the rail rates?

A. I believe the truck rates from El Paso to certain sections of Arizona, the published rates, are the same as rail rates.

Q. Is that true of all of Arizona from your mill?

A. I don't recall how far those published truck rates go.

Q. Is that also true for New Mexico?

A. I do not recall ever having seen the tariff covering the New Mexico rates. There is very little of it in New Mexico.

Q. When you sell into Arizona at destination prices and deduct the rail rate and allow deliveries to be made by truck, you are deducting the same factor which is equivalent to the truck rate?

A. We deduct the rail rate to destination to those points in regard to which I have seen the tariffs.

Q. Are not your truck rates to eastern Arizona points lower than rail rates?

A. I have not seen any rates that were lower than the rail rates; no, sir.

39345 Q. But in New Mexico, I understand your truck rates are lower than rail rates?

A. I am not certain of that, Mr. Wooden; as I say, I do not recall having seen the tariff.

Q. Well, are there some points in New Mexico where they are the same?

A. I could not say whether they are the same or not.

Q. In New Mexico and Arizona, do I understand that you always want to know the destination in order to be able to deduct this freight rate from the destination price to permit the delivery by truck? Is that right?

A. We have always known whom we were selling to, and naturally where it was going.

Q. You would not permit diversion from that point that you thought it was going to, to some other point?

A. No; we cannot tell at all about diversions from a truck shipment.

Q. You would not permit it—after you found it had been done, you would not continue to sell one who had violated your policy in that respect?

A. Well, if we found a continuing practice of that kind, that we felt was to our detriment, we would probably make some effort to stop it.

Q. You consider, of course, diversions from the point where you figured the sale, as an injury to your com-

39346 pany; I believe you testified to that.

A. Yes, sir.

Q. Now, in your experience in the making of sales for truck delivery in Texas and in your competition with other mills in Texas, have you not found that the making of deliveries by truck or the selling for delivery by truck has tended to disturb and upset delivered prices?

A. Yes; in Texas we have a very bad situation.

Q. Well, has that led you to differentiate in your policy

in Texas regarding truck delivery from what it is in the two western States?

Mr. Brick: If Your Honor please, I wonder if we might have the time fixed, in regard to which Mr. Wooden is interrogating at the present time?

Mr. Wooden: Yes; I will be glad to have him do that.

A. Well, the situation that has arisen in Texas has arisen since the date of the complaint, and is existing today.

By Mr. Wooden:

Q. Did you encounter some difficulty with trucking deliveries upsetting delivered prices prior to 1937?

A. None to speak of.

Q. Did you have some?

A. We may have had some. I do not recall, however. It was not serious, as far as we were concerned.

39347 Q. What factors made the situation later more serious than it was at that time?

39348 Trial Examiner Norwood: I will instruct the witness to answer the question as to matters and conditions prior to July 2, 1937.

A. Well, Your Honor, the situation prior to July, 1937, was immaterial as far as its effects on our sales, but it is serious since July, 1937.

By Mr. Wooden:

Q. You did not have that difficulty with the price structure up around Fort Worth and Dallas prior to 1937 on account of trucking?

A. I do not compete in the markets surrounding Fort Worth and Dallas, Mr. Wooden.

Q. Do you know of such condition in that territory?

A. Not like it exists today; no, sir.

Q. Well, at any rate, I understand you say that 39349 the sale and delivery to dealers' trucks in Texas has had a tendency to upset and disturb the delivered prices?

A. No, I did not state that, and that is not the trouble that we are faced with today.

Q. Well, I do not want to go into with what you are faced with today particularly, but I want to know if it is not a fact that in your experience and observation the delivery of cement to dealers' trucks in Texas has tended to disturb and upset the price situation?

Mr. Brick: That question, I take it, is confined to a period prior to July, 1937?

Trial Examiner Norwood: That is what he said, yes.

A. No, I had no experience with any trouble of that kind prior to July, 1937.

By Mr. Wooden:

Q. Do you say that all your difficulties of that sort that you have referred to have been subsequent to that time?

A. Practically all of them; yes, sir.

Q. Practically?

A. Yes, sir.

Q. But you said you did have some before?

A. Oh, we might have had one or two instances, but none that would cause us the least bit of concern.

Q. Now, didn't you testify in the Texas case that there was some difficulty of the sort I have asked you about in Texas?

39350 Mr. Brick: May we have the time fixed?

Mr. Wooden: I will do that.

By Mr. Wooden:

Q. As of April, 1937.

A. I do not recall the testimony that you refer to.

Mr. Wooden: Will you mark this, please, as Commission's Exhibit, for identification.

(The document was marked for identification "Commission's Exhibit 3251.")

By Mr. Wooden:

Q. I am calling your attention to papers marked Commission's Exhibit 3251, for identification, and to pages 1202 to 1204 in that document, purporting to be abstracts of your testimony in the Texas case.

Do you recognize those portions that I direct your attention to as your testimony?

A. Yes. I recognize the first letter here, that is, the first question.

Q. Now, look at the rest of the pages to which I called your attention.

A. Yes, but if you note, Mr. Wooden, that those are cattle trucks and not dealers' trucks.

Q. They were carrying cement to some dealers, weren't they?

A. Yes, sir; in violation of the Texas laws.

Q. And having refreshed your recollection from 39351 the pages to which I directed your attention, are you

now willing to concede that you did testify in the Texas suit that as of April, 1937, the employment of trucks for cement delivery was disturbing your destination price and materially cut the price at some destinations?

A. Yes, but that is so close to the date that I hope you won't think I am trying to evade something when I said July, 1937, because the trouble has come pretty largely, or very largely, as far as we are concerned, since that date. It was starting at that time in cattle trucks, buying their cement in the Fort Worth market and distributing it indiscriminately in the territory we do serve.

Q. But I want it clear so I won't have to offer any portions of this Texas record, that you now concede that you did testify in the Texas case that as of April, 1937, the use of trucks, these cattle trucks, for delivering cement had the effect of disturbing and materially cutting your destination prices?

A. I agree that the cattle truck shipments were very annoying, but I understood your previous question, Mr. Wooden, to say dealers' trucks.

Q. Well, I said trucks, I do not think I confined it to dealers' trucks.

39352 Q. Now, you just said, Mr. Blair, that that situation was annoying. Are you willing to concede that you testified in the Texas case that it was annoying and disturbing from the standpoint of disturbing your destination prices in that locality?

The Witness: May I explain that situation?

39353 By Mr. Wooden:

Q. If you will answer my question, you can give any explanation you want.

Trial Examiner Norwood: Read the question.

(Question read.)

A. It did not—well, I will say "yes" to that, with this explanation, if I may make the explanation of what I mean by that.

Trial Examiner Norwood: Go ahead.

A. These cattle trucks purchased their cement in the Fort Worth market and hauled that cement back to points in the territory we serve at no fixed rates whatsoever and with the regulations of a fixed rail rate from El Paso and with a 7,000 pound maximum which if we attempt to deliver in that manner we must observe; we could not meet

the prices that were being made by those trucks delivering in an unregulated manner and with violations of the Texas load limits.

By Mr. Wooden:

Q. That was because there wasn't any—you could not tell what the truck rate employed was; isn't that it?

A. We could not do that and we could not meet it. We could not even afford to sell in that market against that competition.

Q. Even though you had known what the price was?

A. We knew what the price was.

Q. You mean the delivered price, even in those
29354. markets, was the same as though delivery had been made by rail?

A. No; we knew what truckers were quoting in the market. They would quote anything they could get for it.

Q. Do you mean to say that the mills were selling to truck concerns, and letting the truck concerns re-sell it anywhere they liked, or to anybody they liked?

A. If you will read the testimony on those pages, you will see that they bought that cement at retail prices in the Fort Worth market and hauled it back and sold it at any price that they could get for it.

Q. I see—retail?

A. Yes, sir.

Mr. Brick: Will you fix the area, Mr. Wooden, please?

By Mr. Wooden:

Q. Tell us in what area this condition had reference to?

A. Well, at that time it was being hauled into principally what we call the South Plains territory. That would be around Lovett and points between that and Fort Worth. That has grown to the point where it goes clear to Colorado at the present time.

Q. Is it not a fact that at about the same time in 1937 you added a trucking charge at your plant?

A. I believe that was done in 1936, if I recall the exhibit that was introduced a day or two ago.

29355. Q. And is it not a fact because you added a trucking charge at your plant you were not called upon to make any truck shipments in Texas?

A. No, we never have sold by retail to truckers of the class that we have been discussing.

Q. Well, is it not a fact that because you put on the

added trucking charge at your plant you were not called upon to make any truck shipments into Texas?

A. I would not say that that was the reason at all.

Mr. Wooden: Will you mark this document, please.

(The document was marked for identification "Commission's Exhibit 3252-A and 3252-B.")

By Mr. Wooden:

Q. Who is Mr. H. Liebreich?

A. My assistant in the El Paso office.

Q. I show you the paper marked Commission's Exhibit No. 3252, for identification. Do you recognize that as a letter of Mr. Liebreich that was produced ~~in the~~ Texas case (handing the document to the witness)?

A. I recognize this—I am not certain that it is accurate; this is apparently a mimeographed copy, but I do recognize that as Mr. Liebreich's statement, but it is not entirely correct.

39358 (COM. EX. 3252-A and 3252-B was offered and received in evidence.)

By Mr. Wooden:

Q. Mr. Blair, you testified on page 38990 that diverting of a shipment from a destination that carried a higher net to your mill to a point that carried a lower net, a lower mill net, deprived your mill of a proper return for the point to which shipped. As a matter of fact, in such a case your mill net was lower at the point to which diversion was made, isn't it?

A. If I said that I just got it backwards, Mr. Wooden.

Q. All right. But you also testified in that connection that diversion was usually made from a high net point to a low net point. Did you get that backwards, too?

A. I got that backwards, too, if I made that statement.

Q. And you also, in that connection, said that you tried to collect on the basis of the price, delivered price, at the point to which diversion was made.

A. Yes, sir.

Q. After you turn it around and correct it as
39359 you now have, then that becomes a logical thing?

A. Yes, sir.

Q. You try to get a higher net, do you not—I think I am wrong on that—but that becomes a logical thing from

the fact that the motive for diversion is to get it into higher price territory at less than the going delivered price?

A. That is right. I just got my answer backward if that was the statement made.

Q. Well, after you make a sale for a delivery to a certain destination at the destination price there, your mill net is fixed on that sale, isn't it?

A. If it goes to that point; yes, sir.

Q. Well, regardless of where it goes, isn't your mill net fixed by the difference between the destination
39360 price and the freight on that particular shipment?

A. If it goes to that point; yes, sir.

Q. Well, no matter where it went, no matter where it was diverted to, your mill net remains the same on that particular shipment, doesn't it?

A. That was the thing I was attempting to say we do not want; when I testified the other day.

Q. Well, answer my question, please.

A. Well, it is fixed for that particular transaction, it may be true.

Q. Why is it that you testified that you use the diversion stamp spasmodically? Why should it be used spasmodically?

A. Oh, once in a while, if we think somebody is trying to take advantage of us on a particular shipment we put that on.

Q. Now, with regard to trucking. I understand that you have a good many trucks come in from New Mexico and Arizona to your mill?

A. Not a great many. Figures were put in there for three years, I believe, or two years and a half, the other day, which show the volume; yes, sir.

Q. You do not consider it any more hazardous or dangerous, do you, to load trucks for Arizona and New Mexico than for Texas delivery?

39362 Mr. Withrow: I claim that we were not allowed to develop that subject on the direct examination of this witness because Mr. Wooden objected and because you sustained the objection. There may be one or two references to that because the witness started to answer or because a preliminary question was answered, but as far as the fundamental topic, Your Honor excluded it definitely on record page 39913.

Trial Examiner Norwood: I am not speaking of the

topic, as such, I do not think it was excluded, but, anyway, I feel sure that he told us about the danger of shipping, of loading trucks at his mill.

Mr. Wooden: I am, too, Your Honor. My memory comes to my aid to this extent; Your Honor excluded some photographs of the pictures of the loading of trucks and railroad cars which were made last fall, but the witness in that very connection was allowed to testify and did testify that it was dangerous for trucks loading at the mill.

Trial Examiner Norwood: I feel sure that is correct. The objection is overruled. If I am wrong, I will entertain a motion to strike it.

The Witness: What is the question, please?

39363 Trial Examiner Norwood: Read it.

(Question read.)

A. No, the hazard remains there constantly, and our effort is, as I stated on my direct testimony, that we try in every way to discourage the practice of trucking on account of that danger. We have to meet a competitive condition in Arizona, which we do not have in the territory to the east of us. We have tried, as I said, even to discourage the shipments into Arizona and New Mexico by trucks for that very same reason. Every truck that comes into our plant is an added hazard.

By Mr. Wooden:

Q. You concede that it is no more dangerous to load a truck from Arizona or New Mexico, or for delivery into those States than it is to load one for delivery into Texas?

A. That is correct, with the explanation.

Q. You were asked by Mr. Withrow whether you had any agreement with any of your competitors to use the lowest land-grant rate available, and you answered no. You did secure from the Institute and furnish to the Institute some land-grant rate information?

A. That is correct.

Q. And you have the Institute land-grant rate information available in your office when you want to figure on land-grant deliveries, didn't you?

A. I believe we had such compilation.

39364 Q. That enabled you to ascertain what was the lowest land-grant rate available, didn't it?

A. No; my recollection is that whenever an inquiry came in involving a land-grant rate, it was checked, regardless of the compilation that we had in the office.

Q. Do you mean you checked it with railroads not serving your plant?

A. No; we checked with the two lines—one of the two lines that would be involved. As I stated, there are only two lines out of El Paso that are involved in land-grant rates—the A. T. & S. F. and the Southern Pacific.

Q. Well, the Institute information on land grants showed the source of it, did it not, as coming from either the railroads or from some company?

A. I have forgotten how that land-grant list was formed. I believe such a heading was on it, but I am not certain.

Q. You had to use the lowest land-grant rate information that you could get, regardless of any agreement, or you would have been high on your bid; would you not?

A. That is probably correct.

Q. Did you sell the Government prior to July, 1937, f.o.b. mill, or quote the Government f.o.b. mill when it asked for it?

A. I don't recall any inquiries that we had prior to July, 1937, that did not ask for a bid either f.o.b. 39365 mill or delivered, and in those cases, as a rule, we quoted delivered price.

Q. Do you mean when they asked for it in the alternative?

A. Yes.

Q. Both ways?

A. Yes, we took the alternate, the delivered price.

Q. Is Respondents' Exhibit 3004 an illustration of what you have just testified to (handing the exhibit to the witness)?

A. Yes; that is a case of that kind, and this is the one I referred to, which gave the Government, in effect, an absolute price at our mill, when you take Note 1 on page 3 of this sheet.

Q. Referring to this clause here about the possibility of a lower freight rate, and you would reduce your prices in proportion?

A. Read the first sentence of it:

Q. Yes; that is the clause you are referring to.

A. Yes, sir; that gives the Government the full effect of a price at our mill, if they deduct that from the price quoted.

Q. You consider that an f.o.b. mill price?

A. Yes, sir.

Q. Has your testimony about selling the Government f.o.b. mill been based on that conception of an f.o.b. mill price?

A. No, sir.

Q. Do you consider it an f.o.b. mill price where
39366 you quote the destination cost, with the control clause?

A. I believe I testified that we had only done that in a few instances, and I am not familiar enough with that control clause—I have not seen one of them, Mr. Wooden, in several years—to remember just what the effect of that is.

Q. Did you ever consider the destination cost, coupled with the control clause, as being an f.o.b. mill bid?

Mr. Withrow: Your Honor, I object to going into this matter, unless there is shown in the record in this case a bid with the control clause, bringing the control clause to the attention of this witness. He is asking him to speculate about it. The witneses has said that he does not recall just what cause he may have used, or might have been used, a number of years ago, and has asked him what the effect of it would be or might have been. The witness said he could not recall just what the clause was. We are wasting time, it seems to me.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Answer that, if you can—if you can recall what the control clause provided.

The Witness: That is just what I stated—.

Trial Examiner Norwood: And if you cannot—

The Witness: That is just what I stated, Judge. I do not recall what the effect of it was.

39367 By Mr. Wooden:

Q. Well, do you not recall that the control clause to which I refer provided, in effect, that from the destination cost the Government might deduct whatever the lowest rate was to get an f.o.b. mill basis for invoicing?

A. That was the one that I thought, but I had forgotten until you mentioned that much of it, just the effect of it, and I believe that that would give the Government an f.o.b. mill price. However, it is not as clear, and I think it is likely subject to several interpretations, buf the one I have given on that bid is not subject to any variation whatsoever.

Q. What bid do you refer to?

A. The bid that you just showed me.

Q. Respondents' Exhibit 3004?

A. That is correct. There is not any question but what that, deducted from the price shown on the other page, is a definite, fixed price at our mill.

Q. There was no land-grant rate involved there?

A. No, sir. It there were—

Q. And you knew where the delivery was to be made?

A. Yes, sir.

Q. So when it was delivered with no land-grant rate involved, the cost came right back to the delivered price?

A. It would come in that case to a mill price.

Q. But the delivered cost came right back to your
39368 regular delivered price, did it not?

A. No, sir; if you will recall, that price is below our market price, and I think I so testified.

Q. On account of the reduction in freight rate?

A. No, sir; on account of the price bid to the Government on that bid.

Q. This is the case where you—

A. And may I make this further statement, Mr. Wooden, that whether a land-grant rate were involved, or not, the price at our mill would still be obtained by deducting from the price bid at Newkirk the freight rate shown in that clause, and the land-grant rate then, if any were involved, would effect still a lower cost at Newkirk.

Q. What you allowed here in Respondents' Exhibit 3004 was the regular commercial rate of freight?

A. That is correct; yes, sir.

Q. Is that the case where you made a special reduction after first submitting a bid that was higher—a reduction of 15 cents, after complaint?

A. No; that was on another bid, Mr. Wooden. That bid was at Hatch, N. M.

Q. Was any land-grant rate involved in Respondents' Exhibit 3005 (handing the exhibit to the witness)?

A. No, sir; not from El Paso.

39369 Q. Mr. Blair, on page 39002 of the record of your testimony, you testified that where the Government—when the Government requested bids both ways,—that is, delivered and f.o.b. mill,—that as a rule you bid the delivered price.

Can you give me a specific instance prior to July, 1937,

where your mill at El Paso bid f.o.b. mill to the Government without knowing the destination?

A. I do not think prior to July, 1937, that we ever had a request from the Government not knowing where the cement was going. I think there was one time where they specified for a certain project, but we did not know exactly how much was going to each town, but that was the U. S. Reclamation Bureau, and I think they specified a certain project.

Q. But you did know the various towns—

A. Yes.

Q. —to which it was going?

A. Yes.

Q. When the Government requested bids both ways, and as a rule you bid the delivered prices, why is it
39370 that you did not bid both ways as requested?

A. I think they gave us the option of an alternate, and we selected the delivered price, which was our customary method of bidding.

Q. Do you consider when they ask for bids both ways that you could bid either way?

A. Yes, sir.

Q. Now, directing your attention to page 38992
39371 of your testimony, line 14-15, it relates to the subject of diversion, and you say that you believe in this one instance the customer was ordering for one of the lowest priced points in Texas to which you shipped at that time, and the business was not attractive.

You meant by that, didn't you, that one of the places—that was one of the places that gave you the lowest mill net to which you shipped at that time, didn't you?

A. Yes.

Q. Has it sometimes occurred, Mr. Blair, that when you sold to the Government on a land-grant rate that it resulted in a higher mill net to you than on your commercial business to the same point?

A. No, sir.

Q. Have you permitted the Government to deduct the commercial rate from the delivered price that you quoted when land-grant rate shipment was involved?

A. I do not recall any instance where that question was involved.

Q. Now, in paragraph (68) of your stipulated testimony, you said that you made special prices to the Govern-

ment on certain business. Is that the 15-cent reduction which has been referred to?

Mr. Withrow: Just a minute. Paragraph (8) of the stipulation?

39372 Mr. Wooden: (68).

Mr. Withrow: Oh, I am sorry. I am sorry. I have no objection to the question stating the proper paragraph.

Trial Examiner Norwood: Go ahead.

A. That was one instance, the Conchas Dam bids were other instances, and I believe there were some other bids shown in evidence here the other day that all involves the same special price to the Government.

By Mr. Wooden:

Q. And that was a special price—it was made because the quantity was so large as to assist in continuous operation of your mill?

A. That was part of it.

Q. Do you see any reason why large orders from other than the Federal Government should not have a similar effect on the continuous operation of your mill?

A. No, if we had such large projects in our vincinity.

Q. Continuous operation of your mill reduces your cost of production?

A. Yes, sir.

Q. How large were some of these Federal Government orders that you refer to there?

A. Two of the Conchas Dam bids, as I recall them, were for 250,000 barrels each, and the third one was for
39373 300,000 barrels. These are the only ones that we have ever had in that quantity.

Q. Those were the amounts—

A. Called for in the—

Q. —that you supplied?

A. Well, as I recall, we supplied a little less than the total of those three bids. They carried the usual clause of 25 percent under or over.

Q. Well, wasn't your sales expense in getting such large orders much less per barrel than on smaller orders?

39374 A. That would be true if we could segregate our cost on each individual sale, which we cannot do with any accuracy.

By Mr. Wooden:

Q. You do not doubt a difference exists there, in that general way?

A. No; I believe that was fully taken into account in making our price to the Government on those jobs.

Q. Referring to Respondents' Exhibit 2968-A, B, C, those cards showing your delivered prices at various points—

A. Quotation sheets?

Q. Yes.

39375 A. Yes.

Q. Where did you get the information contained in those cards that showed the rates from other points than El Paso?

A. From the official rate tariffs. We have a complete file of those in our office.

Q. You get those from the official tariffs?

A. Used by the railroads; yes, sir.

Q. As to all of those other points?

A. Yes, sir.

Q. Than your own?

A. Yes, sir.

Q. You checked your own delivered price cards or your tariffs, did you not, with the Institute freight rate books?

A. No; I do not believe that they are checked with the Institute rate book.

Q. Did you not testify that they were checked with the Institute book?

39376 The Witness: I do not recall testifying to it, Your Honor.

Trial Examiner Norwood: All right.

By Mr. Wooden:

Q. Well, is it not a fact that you have checked your own rate information from the rate tariffs of the railroads with The Cement Institute book?

A. No; as I recall, when the books first came out, we checked the Institute books against our rates, but, to my recollection, we have never used the Institute freight rate book to check our figures.

Q. I call your attention to paragraph (48) of your stipulated testimony, which appears in the record at page 38952. Do you want to change your stipulated testimony, where it says:

"These Institute rate books were used at El Paso for the purpose of checking rates in our own rate books
39377 against those stated in the Institute book."

A. Yes; because that is not an accurate statement. We checked the books when they first came out. Since then, I do not believe they have been used by our rate department.

Q. Did you not read over this stipulated testimony of yours?

A. I did, and I overlooked that entirely, Mr. Wooden.

39379 Q. You say in this same paragraph (48), Mr. Blair, that during the time your traffic department used the Institute rate books, you always used the freight rate which you found to be correct, according to the railroad tariff?

A. That is correct.

Q. What was the time during which your traffic department used the Institute rate books?

A. As I stated, the only use that I recall their ever making of that, was the first check when the book came out.

Q. What do you mean by that? When?

A. I have forgotten; I do not have any independent recollection of when the books were issued.

Q. Did you not check against the correction sheets when they came out from time to time?

A. I am not at all certain about that, but my recollection is that they did not.

Q. And is it not a fact that you do not really know just how much checking your traffic department did against the Institute rate book?

A. I don't know the detail of it. It has an office right there convenient to me, and I have never seen our traffic man using those Institute freight rate books.

Q. Did you not testify in the Texas case that you did not know very well how much checking had been done on it?

A. I may have so testified. I do not know all the
39380 details, but I am in and out of the office there constantly, and see that much of it.

Q. Now, I would like to ask you what use your traffic department had for the rate from mills other than your own?

A. Merely to check the entire market, as we might come in contact with it.

Q. Oh, your traffic department is part of your sales department?

A. That is directly under my charge; yes, sir.

Q. Part of your sales department?

For traffic purposes, however, the rates from the other mills than your own did not facilitate in any way the handling of traffic from El Paso; did they?

Mr. Withrow: Your Honor, I object to this line of inquiry. We have already conceded to the Commission a number of points which should cover this entire situation, and yet in connection with the last six witnesses, after the concessions were made, Mr. Wooden has insisted in taking up the time in the hearing room to go into the matter, and I object specifically to his doing so.

Mr. Wooden: May I ask Counsel whether he is willing to now concede that the Institute rate books, in so far as they show rates from mills other than the particular mill involved, serve no traffic purposes?

Mr. Withrow: We stand on the concession we
39381 we have already made. It completely covers the situation.

Mr. Wooden: Then, don't go on putting in stuff like this in this paragraph (48), and continuing to do so.

By Mr. Wooden:

Q. Now, referring to Respondents' Exhibit 2969-A and B—you will remember that conversion table.

A. Yes; A, B, and C.

Q. 2969-A, B, and C, yes. That is right.

That conversion table, of course, was for pricing purposes and not for shipping purposes or traffic purposes, was it not?

A. Yes.

Q. I notice on that table, it is based on 400 pounds per barrel up to 10 cents, and then after that it is 380 pounds.

39382 A. I don't believe that is a correct statement, Mr. Wooden.

(Mr. Wooden handed the exhibit to the witness.)

The Witness: May I have the last question read, please?

(Question read.)

A. These are all made on the basis of 380 pounds per barrel, and all the figures are arrived at in exactly the same manner.

By Mr. Wooden:

Q. How is it that on the one cent rate you have four cents per barrel, and on the one and a half cent you have six cents per barrel, if that is true?

A. 380 times one cent per hundredweight would give that as the nearest round figure. One and a half times 380 pounds will give six as the nearest round figure.

Q. All right.

A. All the way through.

Q. It is just a happenstance that it figures out at the rate of 400?

A. Yes, that is not figured in that manner at all.

39383 Q. It is just a coincidence?

A. That is right.

Q. This conversion table is figured on the assumption that your sacks all weigh exactly the same?

A. Yes. We ship on an agreed weight, Mr. Wooden, with the Western Weighing and Inspection Bureau.

Q. As a matter of fact, there is some variation in the weight of your used sacks, isn't there?

39384 A. There may be. I am not familiar enough with that table to answer it.

By Mr. Wooden:

Q. What are those exhibits relating to the map, the figures on distribution of sales.

Referring to Respondents' Exhibits 2980, 2981, 2982, 2983, 2985, and 2986, and particularly to Respondents' Exhibit 2986, the map of Texas, showing zones in which—zones where you had freight advantage and zones where you were at a freight disadvantage, those zone boundaries would shift or vary, would they not, if you had taken any difference—if there had been any difference in your base price, or if there had been any difference in the base price of other mills, wouldn't they?

Mr. Withrow: Which zone are you referring to now?

Mr. Wooden: Any of them.

Trial Examiner Norwood: All of them.

Mr. Wooden: All of them.

A. Mr. Wooden, there are only two zones shown on here. This green line shows the entire territory that we solicit business in. Now, the line in here is where we have a freight advantage.

39385 By Mr. Wooden:

Q. That is the red line?

A. The red line is the territory where we have a freight advantage.

Now, the price, our mill price, would not affect these lines one way or the other. The base price would not affect those lines one way or the other.

Q. Well, wouldn't a lower base price shift that red line further toward the east?

A. Not at all, because this is a freight rate, where we have a freight advantage and freight rates would have to shift before those lines could shift.

Q. Well, at any rate, if freight rates shift, the lines would shift?

A. Naturally, provided they shift unequally as between those producing points.

Q. Is it your testimony that this map would represent, or does represent the limitations on your selling territory if you sold on an f.o.b. mill system instead of on a delivered price system?

39388 A. There is no such limitation shown on that map. The map certainly limits the territory we could reach in Texas because it is the entire State of Texas.

By Mr. Wooden:

Q. Is it your testimony that you could sell only in the area where you had a freight advantage, if you sold f.o.b. mill instead of on delivered prices?

Mr. Withrow: Your Honor, I object. It is beyond the scope of the direct. It is speculative. It is not relevant or material to the question of whether there is a conspiracy or agreement with reference to prices or pricing.

Mr. Wooden: Why did you put it in?

Trial Examiner Norwood: The objection is overruled.

A. I cannot tell, Mr. Wooden, exactly what we can do on an f.o.b. mill basis until we are faced with that condition as it may exist at that time, which we do not know, of course, what they would be.

39389 By Mr. Wooden:

Q. And it would depend on a number of factors which might change from time to time?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. That is correct.

By Mr. Wooden:

Q. As a matter of fact, it is quite a speculative proposition as to what would happen with regard to your sales territory under an f.o.b. mill system?

A. If you will take the other exhibits that were introduced in connection with this map you will see what we are faced with on an f.o.b. mill basis when a lot of that territory is inhabitated pretty largely by jack rabbits, and they do not use cement.

Q. Will you answer my question now, please?

The Witness: It is not speculative, Your Honor, under the present conditions.

39390 By Mr. Wooden:

Q. It would be speculative under changed conditions?

A. It would be speculative under conditions about which I know nothing in the future.

Q. When you built your mill at El Paso you were familiar with the jack rabbit territory surrounding it, weren't you?

A. Yes, sir.

Q. Now, referring to paragraph (5) of your stipulated testimony, appearing on page 38927, what were the three years that you referred to in that paragraph as being the years that you had shipped over a million barrels?

A. 1928, 1929, and 1938.

Q. As a matter of fact, the 1938 shipments were largely on account of Government orders coming in?

Mr. Withrow: Your Honor, I object to going into this. This is subsequent to the complaint.

Mr. Wooden: This is his direct stipulated testimony in this paragraph.

39391 Trial Examiner Norwood: In what paragraph?

Mr. Wooden: And the paragraph goes to the question of capacity.

Trial Examiner Norwood: What paragraph?

Mr. Wooden: Paragraph (5).

Trial Examiner Norwood: Well, you can bring out anything about that prior to the complaint but not subsequent thereto.

Mr. Wooden: Well, then, I move to strike the paragraph in so far as it relates to anything subsequent to the complaint, and the witness has already said that 1938 was one of those three years.

Trial Examiner Norwood: This paragraph of the stipulation does not fix the time, does it?

Mr. Wooden: No, that is what I was trying to do.

Trial Examiner Norwood: Well, you may fix the time.

Mr. Withrow: In the preceding question and answer he fixed the time. He is now asked specifically why or what were the reasons he shipped what he shipped in 1938.

39392

Trial Examiner Norwood: Yes.

Mr. Wooden: I just wanted to show that the 1938 situation was because of a peculiar and unusual condition of affairs, being Government orders.

Trial Examiner Norwood: I think we had better leave that out.

The objection is sustained.

Mr. Wooden: Well, I move to strike the testimony of the witness and the stipulation paragraph (5) in so far as it relates to the year 1938.

Trial Examiner Norwood: You move to limit its application to tie prior to July 2?

Mr. Wooden: Yes, that is right.

Trial Examiner Norwood: I will grant that motion.

Mr. Withrow: Exception.

Trial Examiner Norwood: Is that objectionable to you?

Mr. Withrow: What?

Trial Examiner Norwood: Is that objectionable to you?

Mr. Withrow: I mean the question of whether or not a mill has excess capacity does not have any bearing on date whatsoever. In other words, if a mill were built in 1937 of 10 million barrel capacity, and they shipped 10 million barrels after the complaint that fact would have a bearing on whether or not the capacity of the mill, that is 10 million barrels, represented excess capacity, or whether it represented the demand of the trade. Now, the fact that it happened after the complaint has no bearing because this witness, or the company—

39393

Trial Examiner Norwood: Now, if you want that to stay in why do you object to it as bringing out the additional information?

Mr. Withrow: He is asking why the shipments were big in that year, and I do not think that is material. The only fact is they were big.

Trial Examiner Norwood: Now, in view of your last statement—

Mr. Withrow: Well, I will withdraw—well, go ahead.

Trial Examiner Norwood: In view of your last statement, I will deny his motion there to limit that and I will also reverse my ruling and permit him to bring out additional information about it.

By Mr. Wooden:

Q. Isn't it a fact that the high percentage of
39394 your shipments to your capacity in the year 1938 was due largely to the fact that you had some big Federal Government orders?

Mr. Withrow: Same objection.

Trial Examiner Norwood: The objection is overruled.

A. There was a substantial percentage, Mr. Wooden, but it was not as large by any means as the other business that we had that year.

By Mr. Wooden:

Q. What percentage was it?

A. I could not give you the figures offhand.

Mr. Withrow: Can I have my objection to this entire line, Your Honor?

Trial Examiner Norwood: Yes, certainly.

Mr. Withrow: Thank you.

By Mr. Wooden:

Q. Well, you got some idea, haven't you?

A. I have an idea that it was around 25 to 30 percent.

Q. In other words, your Government orders in 1938 were 25 or 30 percent of your total shipments?

A. Yes, sir.

Q. Referring to Respondents' Exhibit 2977-A, I will ask you what was the unsettled condition in Texas referred to that had led to considerable misunderstanding?

A. I don't recall exactly what that was, Mr. Wooden.
As I recall, there were some discussions about that
39395 at the Lumberman's convention that year, but I do not recall what they were. I think it was the dealer's selling policy. I mean, the cement selling policy to the dealers and to the trade.

Q. Do you mean that some classes of trade were being sold direct by some mills, and not by others?

A. That is part of it, and I believe I stated on direct examination that the dealers at that time were asking for practically everything to go through the dealer's hands, rather than direct.

Q. Were you aware at that time, in July, 1935, that negotiations had been going on between representatives of The Cement Institute and representatives of dealers' associations about the subject of what trade should be sold direct and what should be sold through dealers?

A. Well, I saw a great deal of that, Mr. Wooden, during the Code during the time of the Code. I don't think I had seen anything after that. I saw in some of these Code releases some arguments between The Cement Institute and a number of dealer organizations, but I do not recall that any of that had gotten out into our territory after the Code days.

Q. Were you aware at that time of the putting out—that the companies up in the North, the Middle West and East had put out announcements stating their policy covering sales?

A. No; I don't believe I had seen any of those at that time.

39396 Q. Now, referring to Commission's Exhibit 1270-M and N, being a letter to you from Mr. Merrill, November 16, 1936, what did you understand by Mr. Merrill's language about the uniform market sale and other conditions, on which he said The Cement Institute would have to be relied upon?

A. I understand that in connection with the figures of the statistics that they gave as to the balancing of our selling conditions against the operations of the mill, as I testified a day or two ago.

Q. Did you consider that as coming within the scope of the language "uniform market selling and other conditions"?

A. Yes, when I knew, as well as I did, the use that Mr. Merrill made of those figures in his check on my activities at El Paso.

Q. Well, did you not also understand that his language included certain matters as prices and terms of sales and discounts?

A. No; I don't think he referred to that. He never had in his discussions with me.

Q. As a matter of fact, that language did include such matters as prices and discounts and terms of sales, did it not?

Mr. Withrow: Your Honor, I object to that question. He has been asked three times if the language did not

include [illegible] it is not a [illegible] of this [illegible] it is improper cross-examination. The letter stands
39397 for itself.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: You may answer that with respect to what you understand it to mean.

A. All I can say about that is my understanding of Mr. Merrill's attitude. Mr. Merrill had never discussed those prices and terms of sales to any extent with me regarding the operation at El Paso. I think he considered that as a sales detail, and left those pretty largely in my hands.

By Mr. Wooden:

Q. Well, I will ask you if you did not testify in the Texas case regarding that very language of Mr. Merrill, that you understood it would include matters of price and terms and discounts?

A. I don't recall everything that I testified on four days on the witness stand in the Texas case.

Q. Well, I show you Commission's Exhibit, for identification, 3251, purporting to be a transcript of your testimony in that case, and call your attention to pages 1291 to 1297, inclusive (handing a document to the witness), and I will ask you if you did not so testify in the Texas case?

39398 Mr. Wooden, I believe the tenor of those pages there shows that these things could be part of the terms and conditions, and that I did not so understand that in the reading of Mr. Merrill's letter, and I believe, if you want the thing accurately, that Mr. Merrill's testimony in this same case with reference to that letter is in the record, if I remember the facts correctly.

By Mr. Wooden:

Q. When Mr. Merrill appears, maybe, we will ask him about it, but I understand it now to be your testimony that the matters about which I ask you could be considered as coming within the language of Mr. Merrill's letter, Commission's Exhibit 1270-M and N?

39399 Mr. Withrow: I object to that question. The question here is not

Trial Examiner Norwood: I will sustain the objection to the question asked.

Trial Examiner Norwood: Can you proceed with your cross-examination and give me time to study this?

By Mr. Wooden:

Q. Mr. Blair, your mill at El Paso has followed the A. S. T. M. specifications on the strength of cement?

A. Yes, we have made our cements to conform to the A. S. T. M. or any Government specifications which are involved in the proposals submitted to us.

Q. You mean by "conform," at least to meet them?

A. Yes; and exceed.

Q. As a matter of fact, you have exceeded them?

A. Yes, sir.

Q. Were not those A. S. T. M. specifications a part of the N. R. A. Code?

A. I believe they are mentioned. I don't know. They are included in the Code. I don't remember just how they are brought into the A. S. T. M.—I mean into the Code. You mean the N. R. A. Code?

Q. Yes.

A. Yes.

Q. Why is it that in paragraph (11) of the stipulated testimony, page 38930 of the record, you say you had no agreement or understanding that any specifications would be followed, if that was part of the N. R. A. Code?

A. That is still without any agreement or understanding. I considered the N. R. A. Code as an order from the Government on it.

Q. You also knew it to be a Code that was formulated by the industry, too, did you not?

A. Well, I knew in a general way how it was formed. I had nothing to do with it, and was not familiar with the details of its formation.

Q. Now, in paragraph (21) of your stipulated testimony, did you mean to say that you have continued to quote delivered prices because your customers request delivered price quotations; do you mean to say that is the only reason you quote delivered prices?

A. That is not the only reason but it is the principal reason.

Q. Is it not a fact that the delivered price system prevents buyers playing mills against each other and thereby pushing the price down?

Mr. Withrow: Your Honor, I object to the question

until there is some showing that there is a delivered price system.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled.

A. I do not think that the present system that we are using of quoting prices at destination prevents the customers from playing one mill against another, because
39408 they are doing it every day.

Q. Well, doesn't it facilitate, tend to prevent customers playing mills against each other?

Q. —for lower prices?

Trial Examiner Norwood: No, he gave us some testimony about competition. I think he has a right to go into it.

The objection is overruled.

A. What is the question, please?

Trial Examiner Norwood: Read the question.

(Question read.)

A. I do not believe that it would have any—make it any easier for a man to try to play one against the other than any other system would use—would do, I mean.

By Mr. Wooden:

Q. Didn't you testify in the Texas case that it
39409 had that tendency?

A. I do not recall any such testimony. I may have so testified, but we have had considerable experience since that time. Of course, that may be ruled out as subsequent to the complaint.

By Mr. Wooden:

Q. But you did not testify about anything that happened after you testified?

A. No.

Q. I call your attention to page 1262 of Exhibit 3251, for identification. Do you recognize that as your testimony in the Texas case?

A. This answer of mine on page 1262 is just exactly in line with what I have just said, that they are playing one against the other, and can do it just as well by any other method that might be used.

Q. Didn't you also testify in that connection that you used the destination price system as one method of keep-

ing from that, avoiding that playing of one mill against another?

A. I said that that was one feature.

Q. All right. When you say that is one feature, you mean that that is one feature of the delivered-price system?

39410 A. Well, probably a better word there might be an effect.

Q. In other words, one effect of the delivered-price system?

A. Yes, that might be one effect.

Q. Let me ask you further to make that clear: When you say that was one effect of the delivered-price system, you meant, did you not, that it had the effect or tendency of preventing customers, buyers, playing one mill against another and getting reductions?

A. Mr. Wooden, my choice of words may not be just as good as it ought to be. It may be better to say it is a possibility of that. Unfortunately, I did not get as much education as I should have, and my choice of words sometimes is not what it ought to be.

Q. Well; let me make this perfectly clear so that I do not have to go to the point of offering this extract from your testimony in Texas.

Didn't you testify in the Texas case that one feature of the delivered-price system was to keep from running into the playing of one mill against another by customers stating that they had reductions from certain mills?

39411 A. I stated that that was one feature of the proposition, Mr. Wooden.

By Mr. Wooden:

Q. By the "proposition," you mean the delivered-price system?

A. Of quoting a delivered price.

Mr. Withrow: Could I have the last two questions read, and the witness' answer, and the interposed question and answer read?

Trial Examiner Norwood: Yes.

(Record read as requested.)

Redirect Examination by Mr. Withrow.

39415 Q. I would like to call your attention, Mr. Blair, to your testimony, record page 39274; the first question appearing on that page, starting on the twelfth line, is a dual question, which you answered, and I wish you would look at it. It starts with:

"I did not ask you if you saw any in there. I say do you testify that there was none."

And I would like to have you explain your answer, if you will.

A. Well, taken with the preceding question, I answered that just exactly the opposite from what it should be.

Q. What did you mean? What is the fact in that situation, as to whether you entered into an agreement with dealers?

A. What I intended to say was there was no agreement whatsoever with dealers. I may be confused there, the way the question is asked, and I intended to reply that there is no agreement there.

39420 Q. In your testimony this morning, Mr. Blair—I do not have it before me—with reference to the matter of trucking, I believe you there—there was some testimony about trucking in Central Texas, do you recall that?

39421 A. I remember questions on that matter; yes, sir.

Q. I believe I am correct that in some place either you or Mr. Wooden referred to unregulated trucking, and I would like to have you explain what you understood by that term.

A. I think I made a statement referring to unregulated trucking. These cattle trucks in Texas are operating under what is known as a special commodity carrier, and they have licenses for that purpose. As I understand the regulations, there is nothing to prevent them from transporting their own material back to any point that they want to. They haul cement and other commodities without any fixed rate whatsoever, taking what they can get for it, but the worst part of the regulation—they haul from 100 to 300 sacks of cement, which would weigh from 19,000 pounds to 29,000 pounds, where Texas has a load limit of 7,000 pounds—a maximum load limit.

Q. Has anything been done either by the State or by the Southwestern Company to attempt to regulate those cattle truckers?

A. I have written the Attorney General of Texas, and also the Director of Public Safety, who has one phase of the law enforcement, regarding this condition, and I have had very nice letters from both these gentlemen, but, as Mark Twain said about the weather, there has been very little done about it.

Q. I am not sure that I understood this morning when Mr. Wooden asked you, I think, if any of your prices
39422 were made with special reference to the existence of trucking, and I do not know whether you said "yes" or "no" to that question. Do you recall his inquiry?

A. I believe he asked about whether they were in connection with the trucking rates into either Arizona or New Mexico.

Q. Well, just tell me are there any prices which your company has had, taking into consideration the existence of trucking and trucking costs?

A. We had to make some prices, and I believe I mentioned that to Mr. Wooden on cross-examination yesterday afternoon, in western New Mexico, where the price of cement is lower in eastern Arizona than it was regularly under our regular delivered price into Gallup, for instance, or Grants—that section of the Santa Fe—that we had to figure a back haul from the Arizona points to arrive at a price in western New Mexico.

Q. In the instance of those prices in western New Mexico, do you refer to those as price cuts?

A. Well, they are not price cuts. They are publicly announced to our dealers in those points. They are published prices, so far as the dealers are concerned.

Q. Well, to attempt to summarize, will you tell us whether or not your idea of a price-cut or a price concession is something that is at variance with your openly quoted price? Is that correct?

39423 A. I consider a cut price an attempt to put out a secret price below what is the going price, however it may be arrived at, in that destination.

39424 ERNEST V. APT was thereupon recalled as a witness for the Respondents, and, having been previously sworn, testified further as follows:

39425 By Mr. Withrow:

Q. I believe when we discontinued yesterday, Mr. Apt, I was asking you about the amount of cement which you shipped in that territory around your mill. Do you recall that?

A. Well, over a period from year to year.

Mr. Withrow: In view of Your Honor's ruling, I am going to offer to prove through this witness that over a ten-year period the Southwestern Company has shipped around 150,000 barrels a year in these counties which immediately surround the mill. The territory during that time has consumed around 300,000 barrels a year.

Trial Examiner Norwood: I think you may show that,

Mr. Withrow: Well, Your Honor sustained the objection when I asked him a question at the end of yesterday, and then the witness was withdrawn.

Trial Examiner Norwood: Had you made that offer of proof then?

Mr. Withrow: I had not made the offer of proof.

Mr. MacIntyre: Our only objection to that is—we consider it relevant and material—our only objection to it is this: We do not consider that there has been any foundation laid to show that this witness is competent to give the facts and figures as to consumption of cement in these various counties, and until that foundation is laid we object, of course, to an all-inclusive summary and specula-
39426 tion as to what has taken place in the territory.

Mr. Withrow: Yesterday it was objected to as immaterial, and the objection was sustained. I have now made an offer of proof.

Trial Examiner Norwood: From the discussion that preceded it, I was convinced that you were going into that subject generally in effect, and it appeared to be covered by previous testimony in one form or another; but as counsel has made a clear offer of proof, I can conceive of its usefulness on one issue that I have in mind; so you may go right ahead, but I will ask counsel not to duplicate.

Mr. Withrow: Do I understand that I am supposed now to ask the question of the witness?

Trial Examiner Norwood: You may ask him and put it on the record in that way.

By Mr. Withrow:

Q. Is the statement which I made—

Mr. MacIntyre: I object to it as leading and no foundation laid to show that this witness is competent to testify to the facts included in that offer of proof, if Your Honor please.

Trial Examiner Norwood: I think you might lay the foundation and then ask him.

By Mr. Withrow:

Q. Are you familiar, Mr. Apt, and have you been
39427 familiar with the dealer and contractor trade in Greene, Clark, and Montgomery Counties?

A. Yes, sir.

Q. And are you familiar with the amount of cement which is normally consumed in that territory?

Mr. MacIntyre: I object.

Trial Examiner Norwood: The objection is overruled.

A. Well, approximately; that is, from the figures—from the information I am able to collect, and from the various dealers. Of course, on all the jobs that are advertised, it is a matter of public information, and, of course, we keep those records.

By Mr. Withrow:

Q. Now, about how much tonnage did the Southwestern Company ship annually, say, over the last ten-year period in that territory, those three counties I mentioned?

A. I should say the average has been—I do not know exactly, but I should say around a hundred thousand barrels.

By Mr. Withrow:

Q. And would you tell us what the average consumption has been?

Mr. MacIntyre: Now, I object. There is no
89428 foundation laid to show that this man has any direct knowledge of how much cement that has been consumed by each dealer and each purchaser and each contractor on the average job in this area, and I object to it as being incompetent.

Trial Examiner Norwood: I think Counsel is correct.

Mr. Withrow: That is a matter of cross-examination and motion to strike.

Trial Examiner Norwood: I think you will have to lay grounds to show his knowledge of this in some way.

Mr. Withrow: Well, he has testified that he follows the contracts, that those are matters of public information, and that he knows the trade—I mean I can lay a foundation. It will take a long time, but it can be laid very simply.

Trial Examiner Norwood: Well, I think already the foundation is laid to the effect that he has no exact knowledge on both of these.

Mr. MacIntyre: Do I understand the ruling is that the objection is sustained?

Trial Examiner Norwood: Sustained, yes.

By Mr. Withrow:

Q. Do you know the approximate amount of cement which is consumed in those three counties, Mr. Apt? Don't tell us the figure. Just tell us if you know the approximate amount as appeared in the regular course of your doing business?

39429

Mr. MacIntyre: Now, I object to any answer given by the witness unless I am permitted a voir dire question to show that he is or is not competent to answer the question that Counsel has put to him. They have not laid any foundation.

Trial Examiner Norwood: That would be cross-examination rather than voir dire.

Mr. MacIntyre: No. Voir dire, to show that the man is not competent to answer the question put to him, so I can raise an objection to it, and show that there is no foundation; they do not lay the foundation.

Trial Examiner Norwood: Counsel is right about that and I was wrong, but I shall not admit these figures to go in until the grounds are laid; that is, to show that he has some actual knowledge of this, and if the Counsel for the Commission objects to the Counsel for the Respondents laying the ground, why, I do not see how we are going to get anywhere.

Mr. MacIntyre: I do not object to them laying the grounds, but to ask him whether he knows without showing whether or not he has factual background to give him the knowledge.

Trial Examiner Norwood: Ask him if he knows it, and then ask him how he knows it, and after that is satisfied you can ask him what he knows.

39430

The objection is overruled.

By Mr. Withrow:

Q. Do you recall the question now, Mr. Apt?

A. No. I would like to have it read.

Trial Examiner Norwood: Read it.

(Question read.)

A. Yes.

By Mr. Withrow:

Q. And how did you get this information, Mr. Apt?

A. From constant contact with the people who were using this cement.

Q. And did you solicit the business in that territory?
A. Yes, sir.
Q. Did you follow the contracts which were let on jobs in that territory?
A. Yes, sir.
Q. Now, would you tell us the approximate amount of consumption in those counties?
Mr. MacIntyre: I object as not sufficient foundation laid to show that the witness can give that, and if you will permit the voir dire question I will show that he does not have the knowledge.
Trial Examiner Norwood: I will permit you to ask a question or two.
39431 Mr. MacIntyre: To show that there is not sufficient foundation for that answer.
Trial Examiner Norwood: Go ahead.
Mr. Withrow: I want to note an exception to this procedure. Voir dire examination applies to documents. This is an irregular procedure.
Trial Examiner Norwood: If I sustain your objection I will exclude this, if you are willing—I am not just satisfied that he knows these figures. I might ask him myself if he kept any records as the result of his investigation.
Did you do that?
The Witness: Why, yes.
Trial Examiner Norwood: What kind of records were they?
The Witness: Well, every time there was a job advertised the matter of the number of barrels of cement to be consumed, as a matter of public record, we report that and keep it in our job file.
Mr. MacIntyre: If Your Honor please, I still—
Trial Examiner Norwood: Go ahead and ask the question.
Mr. MacIntyre: —ask the right to ask this question on voir dire.
Trial Examiner Norwood: Go ahead.

39432 *Examination On Voir Dire by Mr. MacIntyre.*

Q. What is the name of the largest dealer you have in Dayton, Mr. Apt?
A. The largest dealer we have?
Q. Yes; that is, who handle cement in Dayton to which you sell cement?

A. The Dayton Builders Supply Company, I believe.
Q. How many barrels of cement did the Dayton Builders Supply Company sell in 1936?
A. I do not know.
Q. Dayton is in one of those counties, isn't it?
A. Yes, sir.
Q. What is the name of the next largest dealer to whom you sell in Dayton?
A. Hoefler-Stoecklein Company.
39433 Q. Can you tell us for any year previous to July, 1937, the total amount of cement in barrels that that company sold?
A. No, I cannot.
Q. Can you tell me how many barrels of cement that were sold by all of the dealers in Dayton?
A. No.
Q. In any one year?
A. I cannot.
Q. Is Springfield in one of those counties?
A. Yes, sir.
Q. Who is your largest dealer there?
A. The Mills Brothers Company, I believe.
Q. How many barrels of cement did the Mills Brothers Company sell in any one year previous to July, 1937?
A. I do not know.
Q. Can you tell us within 25 per cent how many barrels they sold?
A. No. It would be a guess.
Q. Isn't that true of the Dayton Builders Supply Company, also?
A. Yes, as to how much they sold in any one year.
Q. You would have to guess at it?
A. At an approximate figure; yes, sir.
Q. They sell cement that does not go on large projects?
A. Oh, yes.
39434 Q. Sell consumers in a few bags at a time, and so on?
A. That is true.
Q. Can you tell us how many consumers that buy in a few bags?
A. No.
Q. Can you tell me how many bags that were sold to consumers in Dayton in any one year previous to July, 1937, in lots of less than 10 barrels each?

A. No.

Mr. MacIntyre: I submit that that shows that he is not competent to testify into the question.

Trial Examiner Norwood: Now, is there a question pending? Do you want to ask him some further qualification questions?

Mr. Withrow: Yes.

Trial Examiner Norwood: Go ahead.

Direct Examination (Continued) by Mr. Withrow.

Q. I am not interested, Mr. Apt, in what any particular dealer sold. I am interested in what sales were made, what the total sales were made to dealers and to contractors by cement companies. I am not interested in their re-sale.

Now, can you tell me approximately how much cement was purchased from cement manufacturers selling in that territory, from your experience, from your contact with the trade?

Mr. MacIntyre: I submit the witness has dis-39435 qualified himself from answering the question.

Trial Examiner Norwood: I think so.

The objection is sustained.

Mr. Withrow: Well, exception.

By Mr. Withrow:

Q. What in the course of your duties there in those three counties, Mr. Apt, what classes of the trade did you call on?

A. Called on the building material dealers, the architects, contractors, and in many cases the owners.

Q. Would you also call on concrete products manufacturers?

A. Every one that was a consumer of cement in any large quantity.

Q. Now, what special services, if any, do you perform for ready-mix concrete companies; take, for example, the Ready-Mix Concrete Corporation in Dayton?

Mr. MacIntyre: I object. It is irrelevant and immaterial and cumulative. That question was asked and answered by George Warren, this man's superior.

Trial Examiner Norwood: I do not see why you are bringing that out. What does it go to?

Mr. Withrow: I offer to prove through this wit-
ness that in connection with the soliciting of pur-
chases of Portland cement, this witness performs
numerous services for a purchaser or prospective pur-
chaser, depending upon the type of business in which the
purchaser or prospective purchaser is engaged.

For example, he assists ready-mix concrete companies in connection with special specifications; supplies them with information concerning mixing and workability agents. He assists them in the soliciting of purchases by contractors. He follows the advertisements for bids which a ready-mix company would make, and brings them to the attention of his customers, the ready-mix people.

Among other services which he performs for contractors, he assists them in securing information on various products that they want other than cement, including ready-mix concrete and other building materials, and he attempts to bring together the contractor and the dealer when the contractor is interested in purchasing any supplies from a dealer.

He assists in checking the railroad facilities for a contractor, and arranging convenient delivery schedules.

I further offer to prove that, among other services performed for dealers, the witness brings to the dealers or calls to the attention of the dealers contract jobs and other
jobs in which the dealer would be interested in sell-
ing the cement; that in connection with all of these,
and also in connection with architects and builders,
the witness has promoted a special form of low-cost hous-
ing, composed of concrete masonry units, in an effort to
increase the sales of Portland cement, and in order to sell
more cement on behalf of the Southwestern Company;
that in connection with this activity the witness has car-
ried on considerable research, including the building of
model houses for the purpose of demonstrating this type
of construction and for the purpose of supplying to pros-
pective builders cost information, and that from time to
time, and after a sale has been made, the witness assists
the purchaser in servicing the job, and assists at any time
with the technical problems which may arise, and that the
witness follows contract jobs until the conclusion of the
job, performing any services which may come up.

Trial Examiner Norwood: Now, that is your proffer, and you have your exceptions on it, and I will state that

you have your exceptions on that with respect to every other Respondent that may be called hereafter, without the necessity of any other offers of proof.

39440 Trial Examiner Norwood: I think it is covered sufficiently, and I will give you an exception with respect to every other witness. We will not take any more time on it.

By Mr. Withrow:

Q. Does the Southwestern Company at Osborn protect the customer in case of damage in transit?

A. Yes.

Q. How do you handle this as a traffic manager?

39441 A. I ask the customer, on finding that any damage has resulted in transit, to have the original paid freight bill properly noted, exceptions noted, and returned to us, after which we file claim and reimburse the customer accordingly.

By Mr. Withrow:

Q. Do your regular dealer customers, when you call on them in connection with soliciting business, usually ask you what the price is on your cement, Mr. Apt?

A. No; they very seldom ask me.

Q. And when you went to make a sale in Dayton, did you know what your price was in Dayton at the time of soliciting, without looking it up or making any computation or calculation?

39442 A. Well, as a rule, I would know in Dayton what it was.

By Mr. Withrow:

Q. Well, when you—

A. When I was working in that territory regularly.

Q. When you were working in that territory, those three counties, if you were asked for a price at some destination which you did not recall, where would you get the information?

A. I would call the office.

Q. And they would get it from the price file?

A. Yes, sir.

Q. When you were operating in that territory, did you carry with you a freight book of The Cement Institute?

A. No, I did not.

Q. Did the home office give you a list of bases or basing points for you to carry?

A. No.

Q. Have you ever had any discussions with your customers with reference to the matter of price concessions?

A. Many.

Q. Would you tell us what has been your experience when a friendly contractor or dealer has been offered a concession by a competitor? Does he or does he not give you an opportunity to meet the lower price?

Mr. MacIntyre: I object and point out that the
39443 witness has not yet testified that he knew that his competitors gave anyone a price concession.

Mr. Withrow: All right. I will—

Trial Examiner Norwood: I feel confident that this point has been covered by the witness testifying for this company, and I am going to exclude it.

Mr. MacIntyre: The subject has been covered; I grant that.

Trial Examiner Norwood: Yes, sir.

Mr. Withrow: The matters of price concessions and representations made by dealers or contractors were not covered with Mr. Warren when he was on the witness stand. Mr. Blair did testify, both on direct and cross-examination, about El Paso, but he knows nothing about, and stated that he knew nothing about, the sales territory, except that under his jurisdiction, which was from the El Paso mill. This is a mill some 2,000 miles away.

Trial Examiner Norwood: It shows the same conditions as have been shown by every other company.

Mr. Withrow: I have asked for a concession from Counsel for the Commission on this point, and if I had received that concession I would not go into it.

Trial Examiner Norwood: I do not think it is necessary to have a concession. I am excluding it on my own responsibility.

39444 Mr. Withrow: Well, I offer to prove through this witness that from time to time dealers and contractors of his have represented that they could secure, and had been offered, cement at lower prices than the openly quoted prices of the Southwestern Portland Cement Company, and that they called this matter to Mr. Apt's attention and gave him the opportunity to meet the lower price and get the business on that basis, if the Southwestern Company desired to take it at that figure.

Trial Examiner Norwood: Go ahead.

Mr. Withrow: And I further offer to prove that in discussions with his customers, the customers have represented to him that they preferred an openly announced market price, and that they would find it more difficult to operate, and that it would be to their disadvantage as purchasers of cement if the price of cement were to fluctuate constantly.

I further offer to prove through this witness that customers have represented to him that they were opposed to the granting of price concessions generally in the market although they would, of course, be glad to receive the benefit of one, themselves.

39446 By Mr. Withrow:

Q. Mr. Apt, is one of your duties as a salesman to pick up price information in the field?

A. Yes, report any price information.

Q. Now, when Mr. Warren was on the stand he identified this document as received in evidence, and I would like you to tell me where you, or if you did get that quotation. I am referring to Respondents' Exhibit 1651-A and B.

A. Well, that was apparently taken from the Mills Brothers Company office in Springfield, Ohio.

Q. Well, now, do you know of any instance where you got a quotation from a competitor and not from the dealer to whom the quotation was addressed?

A. Oh, no, absolutely not.

39447 Q. Now, Dayton is your largest big market, isn't it?

A. Yes.

Q. And do any of your customers in Dayton ask you to truck cement?

A. No. I remember of no requests. Oh, I might say, I might add, that I do not remember the occasion, but it seems that perhaps there has been one or two instances in the outlying rural districts where dealers were not prepared to handle full carloads, that is, they just wanted a truck load for some work that was going on at the moment, but that is all. It is not a general request that is received.

Q. Now, can you recall any requests by your commercial customers as dealers and contractors for prices or for the right to buy f.o.b. your mill?

A. I have never had such requests.

Q. Now, did you, as a traffic manager, ever issue your own freight rate books?

A. Yes.

Q. And when was that?

Trial Examiner Norwood: Didn't this other witness tell us all about the freight rate books?

Mr. Withrow: Well, Your Honor, I tried to make it clear on the record that the Southwestern Portland Cement Company operates in perhaps a manner that is quite peculiar to it in that its three mills are essentially
39448 operated as three separate companies and Mr. Blair could not testify about the activities at Osborn because he is not familiar with them, and Mr. Warren, who has testified, came with the company subsequent to the activities I am now asking the witness about, so that although we have had two witnesses from the Southwestern Company, there is this gap which we have been unable to go into.

A. Well, to the best of my recollection, I do not believe I made any books after 1929 or 1930. I am not absolutely sure of that date, but it was about that time that I discontinued making our own freight rate books.

By Mr. Withrow:

Q. And when you discontinued making them, then the company used the Institute books?

A. That is right.

39450 By Mr. Withrow:

Q. Now, did you ever prepare a conversion table for the Southwestern Company?

A. I have.

Q. At Osborn, I mean?

A. Yes.

Q. Now, was the conversion table which you prepared, did you prepare it as the result of any agreement with your competitors?

A. No.

Q. And did you use it by agreement with any of your competitors?

A. No, sir.

Q. Now, have you ever had anything to do in connection with the bids which your company made from Osborn to the Federal or State Governments?

A. Well, very little. I have collaborated with the of-

fice if there was any special information or assistance I could give, but at no time did I compile any bid.

Q. Well, how about the bids made to the State of Indiana back in 1929, 1930?

A. Well, I assisted in those, yes.

Q. And to your knowledge in so far as you know were those bids the prices bid agreed on with any of your competitors?

39451 A. Not to my knowledge; no, sir.

Q. Were they prepared in your office?

A. Yes, sir.

Q. I mean in the Southwestern office?

A. Yes, sir.

Q. Now, during the year 1930 were you ever requested by any of your superiors in the Southwestern Company not to sell all of the cement that you could sell?

A. No.

Q. Have you ever been so requested?

A. No, sir; absolutely not.

Q. Were you ever told in connection with your sales efforts at that time that the Southwestern Company was not to sell more than 70 percent of the annual capacity of the Osborn mill?

A. I never heard of any such instruction.

39456 Q. Did you, Mr. Apt, attend any meeting at Cleveland around November 27, 1931, in which dealers and cement manufacturers were present and discussed the question of trucking?

A. I did not; no, sir.

39457. *Cross-Examination by Mr. MacIntyre.*

Q. Mr. Apt, a couple of questions back Mr. Withrow asked you about whether you had attended a meeting in November, 1931; do you recall?

A. Yes, I recall the question.

Q. Now, I will ask you whether you discussed the subject of whether or not you attended that meeting with anyone during a recent period of time?

39458 A. Yes, I have.

39459 By Mr. McIntyre:

Q. When?

A. Well, before I came down here I checked with Mr. Noland and the people in my office trying to revive my

memory to find out whether or not I had attended such a meeting. I did not want to come on the stand and state that I had ~~not~~ unless I was sure that I had not. I never attended such meeting.

Q. You had no clear recollection, then, without seeing them?

A. I only did that to be sure, but to my recollection I had never attended such a meeting any place, and especially in Cleveland.

Q. Did they tell you that you had not attended?

A. No one seemed to know whether I did or not and I think they would have known it because I had been transferred from Cleveland back to Osborn, consequently I would have had to make a special trip to Cleveland to have done so at that time.

Q. You reason it out that way?

A. Well, I could not get there otherwise.

Q. I say, that is the way you reason the matter out?

A. Well, I believe, as I stated before, if I had attended such meeting I would have remembered it.

Q. Did you discuss it with anyone else?

A. Discuss my—

Q. The subject as to whether you attended this meeting.

A. No. Those are the only people I remember
39460 having discussed it with recently.

Q. How did you know that you should inquire as to whether you attended that meeting or not?

A. Well, I saw in the—it first was brought to my attention in the transcript of testimony that had been given by someone here, I do not remember who, and I as-
39461 sumed naturally if I was called to the stand that that would be one of the things I would have to answer about.

By Mr. McIntyre:

Q. Who called that to your attention?

A. Mr. Noland.

Q. Of your company?

A. That is right. Our office manager.

Q. Have you read the transcript of the record in this case?

A. Very, very little.

Q. Did you read Mr. Warren's testimony?

A. Very little of it.

Q. How much?

A. Well, I don't know, but very little. I started to read it and just never had time to go through it.

39465 Washington, D. C.,
Monday, May 27, 1940.

39467 Mr. Werle: Well, our position has been that the whole T.V.A. episode is so inter-related with that subject matter among other things, that it is pretty hard to differentiate on that score, but I would like to make the motion at this time to strike certain exhibits and certain testimony, which I will specifically refer to in a moment, on the ground that we have been precluded from meeting that testimony and those exhibits.

39468 I think I might hand to the Reporter at this time time a list of the exhibits to which I refer, and he can copy those.

Trial Examiner Norwood: Now, this is a substitute for the motion that begins on record page 38667?

Mr. Werle: That is, the motion made by Mr. Leisure?

Trial Examiner Norwood: Yes.

Mr. Werle: That is correct, Your Honor.

The list of Commission's exhibits is as follows:

340	342
344-A—E	345-A, B
346-A—C	346-D
346-E	350-C—G
351-A—C	354-A
355-A, B	356
357-A, B	359
360-A, B	361-A
361-B—D	363-E, F
397	398-A—E
399-A, B	399-C—E
399-F	399-G
399-H—N	399-O
399-P	399-Q, R
399-S—U	399-V
399-W—Y	399-Z-2-A
39469 399-2-B, C	399-2-D

399-2-E	399-2-F—P
399-2-Q, R	399-2-S
399-2-T—X	399-2-Y
399-2-Z—3-A	399-3-B
399-3-C, D	399-3-E
399-J	399-3-K
399-3-L, N	399-3-O
399-3-P-R	399-3-S
399-3-T	399-3-U-3-V
399-3-W	399-3-X
399-3-Y	399-3-Z
400-A—G	401
402-A—E	406-A—B
410-A—B	495
558-A—B	558-U
562-9-J	562-9-O
562-9T—U	562-9-V—X
562-10-C	562-10-D—E
562-11-J—K	562-12-C—D
562-12-H	562-12-I—N
562-12-X—13-T	562-14-H—I
562-14-V	562-15-B—D
576-P-T	576-V—W
576-2-O	576-2-P
576-4-P	576-4-Q
576-5-H	

Mr. Werle: If I may just continue, Your Honor?

Trial Examiner Norwood: Go ahead.

Mr. Werle: In addition to the exhibits which have now been specified, on the same ground we also move to strike the testimony of the witness E. C. Eckel, the witness C. H. Garity, the witness A. E. Morgan, and the following portions of the testimony of the witness Parsons, which appear in the official transcript at pages 5040 to 5041, 5063 to 5064, 5182 to 5187, 5220 to 5221, which portions relate to this subject matter of the Tennessee Valley Authority. I think we ought to make it clear at this time that we are not receding from our former position, or waiving the objections and exceptions that we have already taken in connection with the Tennessee Valley Authority episode, if I may refer to it in that way. Our former position, I think, can best be stated so that it will be clear by referring to a statement which Mr. Wooden made at record page 35959.

He said this: "The truth of the matter is on this T.V.A. proposition that they (referring to the Respondents) do not like to have the evidence in there that they have made one price in March, 1934, and another in September, 1934,
because of the inference that might be drawn as
39471 to the differences between those two levels of price
while during the period they were engaged in this cooperative activity."

Now, as to that, our position I think has been consistent, that on the state of the issues drawn in the complaint, we have no objection to having in evidence the fact that Respondents bid certain prices in March, 1934, and certain other prices in September, 1934, so long as the Respondents are given an opportunity to prove how the March and September prices were arrived at, that the March prices were not reached by collusive or improper methods, that they were lower than the then comparable commercial prices even though the cement called for was a special type, more expensive to make; that the March prices were not as charged in the complaint arbitrary, unreasonable, and unduly enhanced, or as inferred by Government Counsel from certain Commission exhibits and with respect to the second part of Mr. Wooden's statement that during this period the Respondents were engaged in this cooperative activity, we have no objection to proof of that cooperative capacity as he describes it, so long as we are given the opportunity to explain and to show by evidence what the cooperation was, what these negotiations were all about, what the Respondents were cooperating on to
show that it was nothing improper or collusive
39472 with respect to prices, and that it did not restrain
competition in any way.

Now, that has been our position, I think, and we have maintained it consistently, but in view of the fact we have not been permitted to meet Government evidence which we think properly needs to be met, this motion is made this morning to strike that evidence as specified.

In that connection, further, it may be of some help to Your Honor, we would like to renew as further grounds of our motions to strike these Government exhibits and Government testimony relating to T.V.A., we would like to renew the motions which we made at the close of the Government's case. I believe all of those exhibits were included in those motions to strike and limit, and in that

connection I can call to Your Honor's attention the places where our motions at that time can be found in the motion papers we submitted. I have here an index to that which, if Your Honor likes, we can have included in the record.

The objections will be found in Respondents' Exhibits 385, 386, 387, 388, and 389, and I will show this to Your Honor, if you want to have it put into the record we can do that (handing a paper to the Trial Examiner).

Trial Examiner Norwood: Well, it is already in in the shape of an exhibit, isn't it?

Mr. Werle: Yes, but the places where our objec-
39473 tions to each of the particular exhibits can be found in those motions has been indexed on these sheets, in order that you may be able to find them without having to run through the entire matter.

Trial Examiner Norwood: Wouldn't it serve the same purpose just to hand it to me in the form of a memorandum and not go on the record?

Mr. Werle: I think that is agreeable if that is satisfactory to you.

Trial Examiner Norwood: Yes. Can you spare that?

Mr. Werle: Yes. I would like the record to show that I have handed that index to the Examiner.

Mr. Brick: Mr. Wooden— Mr. Examiner, just a minute, please, until I have a word with Mr. Werle?

Trial Examiner Norwood: Yes.

(There was a short pause at this point.)

Mr. Werle: I think, so the record will be clear, Judge, at this time we can withdraw the motion to which you referred previously that Mr. Leisure made, and we rest on the motion which is new being made.

Trial Examiner Norwood: The present motion. The motion, then, appear on page 38667 and following of the record is withdrawn.

Mr. Wooden: May I inquire at this time whether the present motion is all-inclusive as to matters relat-
39474 ing to T.V.A.?

Mr. Werle: It intends to be.

Mr. Wooden: I would like to say I am not aware of Respondents have been precluded from meeting the evidence that still remains in the record regarding T.V.A. I would say that regarding costs, Your Honor, the cost information and the reasonableness of prices to T.V.A., that Your

Honor's ruling has been abundantly upheld and supported by the subsequent decision of the Supreme Court in the Wisconsin Oil case.

Trial Examiner Norwood: I do not see that the Respondents have been precluded from putting in any evidence except to show what the costs were.

Now, as to your method there, you speak of being precluded from showing the prices were not reached by collusive method. I have been anxious to receive any evidence like that.

Mr. Werle: Well, perhaps, Your Honor does not quite understand our position on that. I tried to make it clear by referring to that statement of Mr. Wooden's, where he does say that there is something going to be drawn from the fact that the prices were different at these two periods and that there was cooperative activity going on during that period.

Trial Examiner Norwood: I think that states the 39475 real issue there.

Mr. Werle: And having put in evidence, his version of this cooperative activity, piecemeal in some respects, if you will, our position has been that we should be permitted to show exactly what that cooperative activity was during this period, what they were doing, and we have been precluded from showing that because exhibits of the Witness Lewis, and exhibits of the Witness Browder, and their testimony relating to what those activities were has been precluded.

Trial Examiner Norwood: No, no. You have been permitted to show these meetings, and what was said at the meetings, and if you have anything more you may do so; and the only thing excluded is the results of some of those by way of duplications and tabulations submitted, and so forth, showing what these costs were.

Now, that does not bear on the issue of collusion or non-collusion.

Mr. Werle: Well, if Your Honor please, that statement is not quite correct because you say we have been permitted to show what discussions were had at these meetings. That is just what we have not been permitted to show. Your Honor ruled just as recently as a week ago, when Mr. Browder was on the stand—I won't attempt to quote it, but I have read it—you may show

39476 that there was a meeting or conference among these people, but I am not going to let you go into what the discussions were at that conference—and that has been your position, and that is included in a number of the exhibits which we offered through Major Lewis. They had nothing particularly to do with costs or profits. They related to what these negotiations were about.

Trial Examiner Norwood: I think you will find that the only thing excluded from those conversations, and so on, were irrelevant matters, and irrelevant matters were received and will be received—well, any way, the record will show all of that.

Mr. Werle: I think our position is clear. That is all we can do.

Trial Examiner Norwood: You have your exception to any of it, and I will consider every word you have said there, and take the ruling under advisement.

39477 J. M. DANNELLY, JR., called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

I am vice president in charge of sales of National Cement Company, and have held that position since
39478 about 1936. Prior to that time, I was acting as sales manager of National, having prior to that been a territory salesman from 1927 to the latter part of 1928; the latter part of 1928 I was made Acting Sales Manager, and subsequently I was made Sales Manager which title I had up until 1936. Prior to 1927, I had no experience in the cement business.

As vice president in charge of sales, my chief responsibility is to sell cement. I have supervision of traffic, although we have a traffic manager that carried out the details. I also have the direction of the policy of the
39479 company. In that connection, I personally supervise the activities of our salesmen, our sales department, and our traffic man.

The following changes have been made in the executive officers of the company since the first page of Com. Ex. 3115-A-E, which purports to be an answer to a question-

naire by the company to the Federal Trade Commission, was made. Mr. George E. Nicholson, who is listed here as president and director of National, is now dead. Mr. George A. Nicholson, listed here as secretary and treasurer, is now president of the company. Mr. Ralph E. Nicholson, listed here as vice president, is dead. I am familiar with all the phases of our company's price and marketing policies during the period since I began to act as sales manager of the company. I am more thoroughly familiar since 1936, after the death of Mr. Nicholson, who up until that time was president of the company and maintained absolute discretion of it.

39480 Q. Mr. Dannelly, will you look at Respondents' Exhibit 3012, for identification, and tell us what it is, please.

A. It is a map showing the area in which our mill is located, and the adjoining areas in most of which we solicit our business.

Q. And who prepared that map?

A. I prepared the map. It was actually drawn by a young man in the highway department in our building.

Q. And does it show the area in which you solicit business normally?

A. Yes, it does. We do not solicit business in all the area shown on this map, but we have a line drawn showing just exactly.

Q. That is the blue line that appears on the map?

A. That is right.

Q. Includes the area in which you solicit business?

A. Right.

Q. Will you tell us what this shaded area upon the map represents?

A. The shaded area is the area in which we might be said to have a price advantage over the closest mill in terms of mill return.

Q. Now, does this show also the location of competing mills in your area?

39481 A. Some of the competing mills, yes. It does not show a silo at Memphis, or does not go up as far as Cape Girardeau.

Q. They are designated, are they, by a black dot?

A. Right.

Q. Now, there are certain freight rate figures shown

over here on the right-hand side of the map. Can you tell me what is the source of those figures?

A. The railroad tariff or Freight Rate Institute book.

Q. And with respect to the mileage figures shown over there?

A. Those mileages were taken from the railroad tariffs.

Trial Examiner Norwood: Do you refer those rates to the particular tariff from which you derive that?

The Witness: Do we make any reference here, Judge?

Trial Examiner Norwood: Yes.

The Witness: No, sir. They are just in terms of cents per barrel with reference made to the source of them.

Trial Examiner Norwood: Well, is there a definite date there to which they apply?

The Witness. As of December, 1933, this map was actually prepared.

By Mr. Werle:

Q. Now, there are certain population figures shown on the map in figures. Will you tell us what was the source of those figures?

39482 A. They were taken from R. G. Dun & Company's credit book.

Q. To the best of your knowledge and belief, are the figures shown on this map, and the areas shown, accurate?

A. Oh, yes.

Examination on Voir Dire by Mr. MacIntyre:

Q. Mr. Dannelly, you say this mileage information came from railroad tariffs?

A. Yes.

Q. And the terms of freight rates per barrel from The Cement Institute freight rate books?

A. Well, I asked our traffic manager for those rates. I did not get them, myself. He apparently got them from The Cement rate book.

39486 Trial Examiner Norwood: I will receive it subject to developing that similarity of the situation. The objection is overruled.

39488 Q. I wish you would explain to us the reason why your solicitation of business apparently is confined, so far as the State of Tennessee is concerned, to

this little corner up here around Memphis, Tenn. How is it you do not go above the State line in the other area?

A. We formerly worked a large portion of Tennessee, but the erection of new plants and the hard competition that we met up there, forced us back down out of
39489 Tennessee. Of course, we could work Tennessee if we wanted to, but we cannot make any money out of it. Memphis is a large consuming market. I think it is the largest city in Tennessee. Our salesmen, frequently on the highway, who has been working in the territory, has to pass through Memphis to make the top of the "V" there, and, naturally, he spends some time.

Q. With respect to this line that runs across the southern boundary of Tennessee, do you have any arrangement of any kind with the mills in Tennessee that you won't ship up there?

A. Oh, no, indeed. Our men, as I said, work up there. If a man wanted cement up above there, we would be glad to take him on as a dealer.

Q. Is that so with respect to the other boundaries of that blue area?

A. That is true.

Q. In this Burns and Clark questionnaire answer, Commission's Exhibit 976-9-Y, the statement is made that your normal market area was determined by whether or not you obtained a satisfactory mill net, among other things. I want to know as to that whether or not that meant
39490 satisfactory, that if was a profitable mill net in all cases?

Mr. MacIntyre: Then, I object to the question as leading. It is putting into his mouth the word "profit."

Trial Examiner Norwood: Well, let him answer it. The objection comes too late.

Answer, what did you mean by "satisfactory mill net"?

A. Net out of which we could make some money.

By Mr. Werle:

39491 Q. In all cases what I have reference to is whether or not in all cases you do make money on every sale you make.

Mr. MacIntyre: That is objected to.

A. Oh, no, not on every sale, no.

39492 Q. I asked you a moment ago about your solicitation in the State of Tennessee. Perhaps I can

save a little time with respect to the Louisiana market, Mr. Dannelly. Will you refer to Commission's Exhibit 976-9-Z, which gives your Burns and Clark questionnaire answer, and refer to the answer to questions 3 and 4 appearing on that page. I will ask you whether or not that statement as it appears there is correct as of that time?

A. Substantially correct.

Q. Now, have you in the National Company had the experience of having given up an area in which you had solicited cement, and then gone back into that area again and tried to sell?

A. We may have attempted to do so, but we have
39493 not found it possible.

Q. Will you explain why that is, just briefly, please.

A. Well, of course, in those territories in which the price is so low that it is not interesting, if you withdraw you lose your contact with your dealers and your customers, and if you try to go back in there, why, your competitors have already grabbed them off.

The witness identified Resp. Exs. 3013-A, B, 3014, 3015 and 3016 as National contract forms used from 1927 until the period of the N. R. A. Code. The blue pencilled dates on each exhibit indicate the period of time during which each of the forms was used.

39494 The witness identified Resp. Exs. 3017 A, B; 3018 A, B, 3019 A, B, and 3020 A, B; as National contract forms used during the period beginning with the N. R. A. Code and carrying through until the present time. The pencilled dates on each exhibit are the dates during which each of the forms was used.

39500 By Mr. Werle:

Q. Mr. Dannelly, are you at the present time able to make any estimate for us as to the approximate time that the changes shown in these different years were made?

A. Not definitely, no, but this stamp was placed on this one—

39501 Q. That is Respondents' Exhibit 3014?

A. For use prior to the time that there became prevalent in the market what we termed a five-cent saving time, and naturally when that came out, why, we changed our contract. We did not want to get new contracts made, so we left the stamp off. Let me see if that is the case.

Q. Well, do you have in the—do you keep any record, Mr. Dannelly, which would show you on what dates you have had these various forms printed up by the printer?

A. No, we have not.

Q. In order for you to determine the precise date that the changes reflected in these contracts were made, would you be able to do that, do you know?

A. I do not know. It is just one of those things you would have to try to do yourself. You would not be able to describe to anybody else exactly what you want.

Q. As I understand you, these Respondents' Exhibits 3013 to 3020 represent a complete set of the forms that your company used between 1927 and right up to the present time; is that correct?

A. That is correct.

Trial Examiner Norwood: You used no different forms for any contracts during that period?

The Witness: None whatever, sir.

39504 By Mr. Werle:

Mr. Dannelly, let me call your attention to Respondents' Exhibit 3017-A and B, and ask you if you can tell us whether or not you used a form such as that prior to the N. R. A. Code? Do you need the others to refresh your recollection?

A. I would like to have the other form, the first one. Now, we do not use this. We have previously furnished a dealer with a form of contract which he could go to the contractor, the consumer, for his re-sale. This is a
39505 form of contract that the dealer would make with us.

Q. That is Respondents' Exhibit 3017-A and B. Now, can you tell us the circumstances under which you adopted that form of—which is Respondents' Exhibit 3017-A and B, for identification?

A. We adopted that because it was the recommended practice under the N. R. A.

Q. And does that in any way help you to fix the time as to when you adopted that form?

A. Yes. We adopted it when the N. R. A. went into effect as soon as we could have some printed.

Q. That is, the Code for the Portland Cement Industry?

A. Yes.

Q. And that went into effect in December, 1933?

A. 1933.

Q. Can you state now whether or not you used this form

beginning at the time of the N. R. A. Code for cement and through that period until 1937?

A. We used it from December, 1933, into or through the year 1937.

Trial Examiner Norwood: Now, did you use that exclusively?

The Witness: Well, no, sir. We used this in conjunction, Judge, with an additional contract we had.

39506 This was a form of contract with the dealer on cement that he had committed himself for for re-sale.

Mr. Werle: Will you look at Respondents' Exhibit 3018-A and B, and tell me whether or not that is the specific job contract which you used in conjunction with Respondents' Exhibit 3017-A and B?

The Witness: That is correct.

By Mr. Werle:

Q. And can you tell me whether or not Respondents' Exhibit 3018-A and B was adopted also at the time the N. R. A. Code for the Cement Industry went into effect?

A. Yes, sir.

Q. Now, then, you mentioned that prior to Respondents' Exhibit 3017-A and B you had a form of contract for a dealer's use. Let me show you Respondents' Exhibit 3013-A and B, and ask you whether or not that is the form to which you referred?

A. That is correct.

Q. And will you tell me whether or not that was superseded at the time of the Code by Respondents' Exhibit 3017-A and B?

A. It was.

39508 (RESP. EXS. 3013-A, 3013-B, 3017-A, 3017-B, and 3018-A and 3018-B were offered and received in evidence.)

By Mr. Werle:

Q. I think you told us you discontinued the use of this—well, as to these three exhibits, Mr. Dannelly, were these forms actually used by your company in contracts—that is, were your contracts executed on forms such as these?

A. They were.

Q. And is that so with respect to Respondents' Exhibits 3014, 3015, 3016, 3019-A and B, and 3020-A and B?

A. Yes, sir.

Q. Now, as to Respondents' Exhibit 3017-A and B, will

you tell us the circumstances under which you discontinued the use of that in 1937, if you recall?

A. Well, we gave out of them, and there was du-
39509 plication—in other words, it was not necessary to have that form of contract, we did not think, so we just stopped using them.

Q. You say you gave out of them. What does that mean?

A. We probably used our supply up, and as long as it was not necessary to have them in the transaction of our business, we did not have any more printed.

Mr. Dannelly, will you tell me whether or not you have made any substantial changes in your contract forms since the expiration of the N. R. A. Code?

A. No substantial changes, no.

Q. Can you tell me whether or not any of your competitors have made any changes in their contracts since that time?

A. I do not know. I remember one instance where we found that they had been doing it, but we cannot tell what our competitors have done until we find out from the salesmen in the field.

Trial Examiner Norwood: Now, when you make a contract, do you ever—that is, making a contract on those blanks—do you ever vary the terms any by erasing parts of it by special agreement and putting in other parts?

The Witness: Very seldom, Judge. I do not recall where we have. We have to bid to some department that had their—we may have put a rider on it to conform to a bid some time; that is entirely possible, but I do not remember any case where we have.

39510 By Mr. Werle:

Q. Now, you say that you continued the terms and conditions substantially since the period of the N. R. A. Let me ask you whether or not that has come about through any arrangement, understanding, or agreement with any other Respondent companies?

A. No, sir.

Q. And except in so far as your contract forms and your provisions may have been influenced by the N. R. A. and the Cement Code, have the terms in your contracts been brought about at any time directly or indirectly as the result of any collusive arrangement or understanding with any other Respondent?

A. No, sir.

(The foregoing testimony beginning "Mr. Dannelly, will you tell me whether" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Q. Now, in Commission's Exhibit 3115-A to E, on page C, there is a statement of discount terms of your company, and there appears to be some gaps between those dates of using those terms. Can you tell me about that, please?

First, were there any gaps in there?

A. No, there were no gaps. I did not make this up, but there were no gaps in the discount terms. They were in sequence, and why any gaps were left in that date, I could not tell you.

Q. Now, with respect to this statement in this exhibit, that as of November 28, 1930, your discount terms were 10 and 5, does that accord with your recollection?

A. Will you ask that once more?

39511 Q. Beginning in November, November 28, 1930.

A. I believe to the best of my recollection, yes.

Q. Now, do you recollect the circumstances under which you changed your trade discount from 10 cents to 5 cents in November, 1930?

A. It was caused by the appearance in the field of a new marketing plan by one or more of our competitors.

The witness identified Resp. Ex. 3201 A to D as
39512 coming from the files of National. It was sent in to National either by its salesman or its dealer, Mr. L. M. Fleming, Brundidge, Alabama. The handwriting on the front page, some computation is the witness': "We tried to check on every quotation we find in the field and that was apparently an effort on my part to keep in touch with the market price at Brundidge."

Q. Now, prior to the time that it came to your attention that the Lehigh Company had in the field an announcement such as Respondents' Exhibit 3021-A to E, had you had any knowledge that such a new discount plan was going to be put into effect by the Lehigh Company?

A. No, sir.

The witness identified Resp. Ex. 3022 as a Na-
39513 tional quotation sent out November 28, 1930, to its dealers, withdrawing the 10 (cent) dealer trade discount and offering them the 5-cent dealer plan. The pencil handwriting in the lowest lefthand corner is his own. It refers to the question asked a while ago as to who would

get advantage of the price without the discount, would be highways and Government—highway department and United States Government.

39514 Trial Examiner Norwood: They may be received as marked.

(RESP. EXS. 3021-A to 3021-D, and 3022, were offered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. Dannelly, if it will help you to refresh your recollection, will you look at Respondents' Ex-
39515 hibit 3022 and the date there, and then if you can from that try to fix for us more definitely the time that you stopped using Respondents' Exhibits 3014 and 3015, for identification?

A. We apparently started Respondents' Exhibit 3014 at the time we went out with the announcement on November 28th.

Q. Yes. And how about Respondents' Exhibit 3015?

A. Well, they were used concurrently with each other. They are at the same time. This was to contractors and this was to dealers, with a stamp on it.

Q. I see.

Can you tell us whether or not, then, the 1930 referred to on Respondents' Exhibit 3014 and Respondents' Exhibit 3015 can be fixed by you now as approximately the latter part of November of that year?

A. Approximately.

39517 Q. Now, Mr. Dannelly, during the period of November 10, 1930, up until November 28, 1930, will you tell me whether or not you observed that other competitors did or did not issue announcements of a similar character?

A. Some of them did and some did not.

Q. And can you tell me whether or not that had any effect on your determination to issue this policy?

39518 A. Well, we saw eventually practically all of them came out, and when they did, why, we followed along.

Q. During the interval between the time that you first learned of this new Lehigh policy and the time that you issued your own, did you have any communication or contact with the Lehigh Company or with any of your other competitors which influenced you in your adoption of that trade discount plan?

A. No, sir.

Q. And did you subsequently abandon the trade discount?

A. We did.

The witness identified Resp. Ex. 3023 to 3027 inclusive as reports from National salesmen reporting dealer reaction to this plan.

39519 Trial Examiner Norwood: Now, I have already ruled that we are not to receive any more of those reports from the field about the dealer reaction, and the Counsel has their exception on that. It is clear in the record.

Trial Examiner Norwood: Well, I shall accept that as an offer of proof, and exclude those exhibits.

Mr. Werle: Well, it was not intended to be an offer of proof, if Your Honor please. I was merely trying to explain to you what I had in mind.

I except to Your Honor's ruling with respect to Respondents' Exhibits 3023 to 3027, for identification. They
39520 can stand, themselves, as an offer of proof without any statement from me.

By Mr. Werle:

Q. I might ask you, Mr. Dannelly, whether or not these Respondents' Exhibits, for identification, to which I have just referred, represented typically the attitude which was expressed to you through your salesmen from your dealers during this period?

A. Correct.

Q. And would you tell me whether or not they played any part in your subsequent determination to discontinue this 5-cent dealer payment plan?

A. Of course they did.

Trial Examiner Norwood: Now, you may bring out with one or two questions there—you could bring
39521 out with one or two questions there this situation of changing that policy, and he can tell us why, and to do this the long way through documentary evidence is a waste of time.

Trial Examiner Norwood: I shall refuse to have those marked at all.

39522 The witness identified Resp. Ex. 3032 as his telegram to all National salesmen, dated January 28, 1931, relating to the dealers' service payment plan; Resp. Ex. 3033 as a letter from the Andalusia Manufacturing

Company, Andalusia, Alabama, dated January 26,
39523 1931, which came to his attention; Resp. Ex. 3034-A
and B, as his response to Resp. Ex. 3033. That telegram and those letters were written and received in the regular course of business and it was the regular course of business to write and receive these documents. Resp. Ex. 3034-A and B it typical of the way in which National had been handling this dealer service payment plan during the latter part of the period that is was in effect.

Mr. MacIntyre: Respondents' Exhibit 3032 is objected to as incompetent, irrelevant, and immaterial. It is a telegram from this witness to his salesman. He can tell us all about that—in fact, he already has.

39524 Respondents' Exhibit 3033 and Respondents' Exhibit 3034-A and B, are incompetent, irrelevant and immaterial, contain opinions, speculations, and conclusions.

Trial Examiner Norwood: What are these papers introduced to show?

Mr. Werle: The date and the time to the hour at which the company finally decided to abandon the plan. A letter written that same day prior to 4:30 in the afternoon showing that the company had not yet taken any definite position then as to what its attitude was on this subject matter. Immediately prior to the time it abandoned it, and that letter, of course,—the one referred to in their answer. If we offered this letter without the one from Andalusia, why, there would have been an objection on that score.

Trial Examiner Norwood: Now, you are simply putting this in to show that you arrived at the policy of discontinuing independently of any action of competitors; is that right?

Mr. Werle: Yes, independent, and upon what it was based upon—what that action was based on.

Trial Examiner Norwood: And you have already shown that you put that policy in effect after picking up a competitor's terms in the field, and decided to meet that?

39525 Mr. Werle: That is correct.

Trial Examiner Norwood: Is that right?

Mr. Werle: That is correct.

Trial Examiner Norwood: What does this add to that?

Mr. Werle: This is now the decision to abandon it about a month later, and the record shows now a number of other companies,—the dates upon which they abandoned it, and I think those dates have some bearing upon whether or not there was any collusive arrangement to abandon it.

Trial Examiner Norwood: Well, would the telegram show the date that it was abandoned?

Mr. Werle: Yes, it would. It shows the date it was sent, and the hour, and this letter which was written on the same day as the telegram indicates that he had not yet quite made up his mind to abandon it as of that time.

Trial Examiner Norwood: Well, he can tell us about that, and he could also tell us about this date, but I will sustain the objection to all but Respondents' Exhibit 3032, which is received for the sole purpose of showing a date.

(RESP. EX. 3032 was offered and received in evidence.)

39526 Trial Examiner Norwood: I do not see that it will add anything to the information we have already received.

Trial Examiner Norwood: I cannot see how the fact that he wrote a letter and had not made up his mind, and 10 minutes later made up his mind, throws any light on this subject, and I think we are wasting time on it.

39527 By Mr. Werle:

Q. At the time that your company abandoned this dealer payment plan, Mr. Dannelly, did you know whether or not all of your other competitors were going to abandon it?

A. No, I did not.

Q. Had it or had it not come to your attention that some of them had prior to the time?

A. Oh, yes, some of them had, yes.

Q. Now, did you have any arrangement or anything that could be construed as an understanding, in your judgment, with any of your competitors either with respect to adopting this plan or with respect to abandoning it when you did?

A. We did not.

Q. Will you look at Respondents' Exhibit 3035-A, B, and tell me whether or not that is the way in which your announcement to the trade of the discontinuance of this plan occurred?

A. It was.

Q. Did you send any announcement of any kind other than that?

A. No.

Q. And was that sent out as of the date shown on there?

A. Yes, January 28th.

(RESP. EX. 3035-A and 3035-B was offered and received in evidence.)

Mr. Werle: It is hereby stipulated and agreed that the witness J. M. Dannelly, Jr., shall be deemed to have given direct testimony in these proceedings, as follows, subject to the conditions referred to by Mr. MacIntyre:

1. The National Cement Company was incorporated on July 3, 1922, in the State of Alabama. Its principal office is located at Birmingham, Ala. It has no branch offices. National has one plant located at Ragland, Ala., which is situated approximately 45 miles east of Birmingham on the Seaboard Air Line Railroad. National does not have any subsidiary warehouses or silos.

2. The plant now operated by the National Company had been operated at the same location by the Coosa Portland Cement Company for many years prior to its acquisition by National. Although the plant is not new, many improvements have been made in it from time to time, and today it is a relatively efficient unit. The principal raw materials necessary for the manufacture of cement are obtained from a quarry located adjacent to the National plant.

3. In order to compete successfully against its numerous competitors, National has found it necessary to offer various services to its customers. In the course of their periodic calls on dealers, National salesmen assist dealers to solve many local sales problems: They call on local customers who may have need for cement; they contact local consumers who are not trading with National dealers in an effort to induce them to change to National cement. They continuously furnish National's dealers and their customers technical literature of varied character. National endeavors to keep informed regarding new construction projects that are likely to provide business for some of its contractor customers. As soon as a job is advertised, the company sends "information sheets" to its salesmen. The salesman is required to visit the site of the project and fill in on the information sheet for the assistance of contractor-customers all pertinent facts surrounding the job, such as: The name of the authority letting the business, the amount of money available, the name of the architect, the names of nearby sand and gravel producers, and the names of any other manufacturers whose products are expected to go into the job. The

completed information sheets are sent to contractors who might reasonably be expected to be interested in the project. National's salesmen, often accompanied by the witness, attend the letting and meet the contractors. The salesmen place themselves at the contractors' disposal to render all assistance they can in locating materials and facilities which the contractors may need if they are successful bidders.

4. Although National has no man on its staff whose sole duty is to give technical advice, almost all members of its sales organization have a well grounded knowledge of technical matters, and they frequently lend their services to its various customers. All of the services mentioned result in dollars-and-cents savings to National's customers and the company has obtained much business on the basis of the service which it gives to its customers and potential customers.

39533 5. In 1939 National shipped to approximately 525 dealers. Dealers have always been the most important single outlet for its product and represent the year in, year out business upon which National must depend.

6. Every dealer gives service in his own locality which tends to promote the sale of cement. This service often involves supplying contractors at very low cost with materials other than cement, but which are vital to the success of the construction job. Often the dealer will assist a contractor in getting side track facilities. A dealer will take a vital interest in getting a contractor acquainted with the various sources of supply in a particular town and many dealers have given temporary office space to contractors. The dealer exercises all the other functions of a retailer and such services would be almost impossible for the National Company to provide.

7. National sells direct to certain users, namely State and Federal agencies, railroads, products manufacturers and contractors on particular kinds of work. Although this direct business is a large proportion of the total shipments by National, it is not sufficient to make it possible for National to sell all of its cement direct and forego dealer customers. During the early experience of the witness with National it was selling an increasingly greater proportion of its business direct. At the same time the company was gradually losing dealer customers. It was found that

39534 sales expense and service requirements on contractor business generally ran a great deal higher than on dealer business, and in the long run, therefore, it was less profitable than sales of an equal volume to dealers. Furthermore, the consumption of cement by contractors fluctuated considerably. This fluctuation caused considerable difficulty in planning production schedules as dealer business diminished, and this resulted in higher production costs.

39537 20. In addition to other reasons for National's disinclination to deliver cement to trucks at the mill its experience has been that truck loading is a nuisance. The plant was designed for carload railroad shipments and it has had no adequate facilities for loading trucks. National has never had sufficient demand for the loading of trucks to make it worth while to make the expenditure necessary to establish special truck loading facilities.

21. Apart from any effect that truck deliveries have had upon National's dealer relations, its experience has been that it is uneconomical to sell cement to trucks because it amounts to selling cement at retail. Buyers of cement for delivery to trucks generally purchase small amounts at a time, yet the same clerical costs are involved in handling the account for a small truck load that would be involved in an order for one or more carloads.

22. The National plant is far removed from any navigable streams so that it has never had any occasion to use water for transporting cement.

23. Regardless of the amount, or of the kind of work involved, National has never quoted the United States Government through a dealer, but on certain classes of work has not submitted bids in response to invitations from the United States Government. This work has been
39538 largely confined to emergency relief projects requiring less than carload lots or where the work is located within city limits. Traditionally such kinds of work have been sold by dealers when private buyers were involved.

24. The National Cement Company has been a member of The Cement Institute since December, 1929. The witness has never been an officer, trustee, or a member of any Institute committee, nor has any officer of the National Company ever held such positions in The Cement Institute.

25. It has been National's policy to sell as much cement

as possible in markets which will yield the highest net. The company does not have any definite minimum net below which it will sell, but it is a matter of determination on a given sale, with due consideration to the fact that volume is important because it reduces unit cost. The mill net is the figure the company receives after package charges, freight, and discounts have been deducted from its delivered price. Because sales expense is such a variable
39539 factor, it is impracticable to attempt to determine sales expenses for each sale. Although National takes business at variable nets, it could not take the lowest nets it receives on all shipments and still remain in business. Low net business has often been refused by National, but when accepted, it is taken merely in an attempt to increase volume and reduce unit cost.

26. At present National prepays freight on all cement shipments. This practice was adopted recently in order to offer terms as advantageous as competitors who were beginning to prepay freight on all of their shipments. The assumption of these charges for all customers has created a heavy financial burden upon the company. However, National has no alternative but to meet this competition because failure to meet it would be sufficient cause for it to lose business.

39540 I also object to paragraph 26 as being irrelevant and immaterial, and containing conclusions as relating to matters subsequent to the date of the issuance of the complaint.

39547 Q. About how many dealer-customers does your company have, Mr. Dannelly?

A. Approximately 500.

Q. And do any of them sell National cement exclusively?

A. Very few, if any.

Q. Let me call your attention to Commission's Exhibit —copy of it—which was the N. R. A. Code of the Cement Industry, particularly Article XI, Section 3, which refers to a definition of a dealer. Will you tell me whether or not that definition which appears in the Cement Code was your first experience with a concept of a dealer?

A. The first experience of a detailed wording of the definition of "dealer."

Q. But had it been your first experience with some qualifications, let us say?

A. Oh, no, no. We had always had certain qualifi-
39548 cations for a man to be recognized as a dealer.

Q. Now, in connection with that definition, did you or did you not observe it during the period that it was in effect in the Code?

A. We did.

Q. And can you tell us what, if any, effect that observation by you or observance by you had on your dealer relationships at that time, and since?

A. I do not know of any pronounced effect.

Trial Examiner Norwood: Did you lose any dealers by it, or gain any?

The Witness: No, sir; not to speak either way, Judge.

By Mr. Werle:

Q. Now, in connection with the selection of your dealer-customers, has it made any difference to your company whether or not the prospective dealer was a member of some building dealers' supply association?

A. Not at all.

39549 Q. Has your company been requested by any such associations from time to time to discontinue selling certain of your dealers for one reason or another?

A. Yes.

Q. And what has been the position that your company has taken on such situations? Have you acknowledged them, or what have you done about them?

A. Oh, perhaps once or twice out of courtesy to the organization we acknowledged the receipt of the letters, but we felt like it was our own business to run.

Q. And let me call your attention to Commission's Exhibit, for identification, No. 584-B, C, D, and E. Will you tell me whether or not you recall those letters?

A. Yes. I recall them quite well.

Q. And do you recall that they were submitted under the subpoena duces tecum that was served upon your company by the Federal Trade Commission?

A. Yes, sir.

Q. A year or two ago?

A. Yes, sir.

Q. Will you refer to Commission's Exhibit, for identification, 584-D, and tell me whether or not that letter is typical of that manner in which you handled such matters when you did acknowledge them?

A. Yes, that is typical.

39550 Q. Will you tell me whether or not after this letter dated September 20, 1935, which is marked

Commission's Exhibit, for identification, 584-E, will you tell me whether or not you had any further conference or, rather, communication with Mr. Wheeler with respect to this matter after that?

A. We did not.

Mr. Werle: I would like to have these marked as Respondents' Exhibits at this time, and offer them in evidence. They still have the Commission's Exhibit identification numbers on them.

(The documents were marked for identification "Respondents' Exhibit 3036-A to 3036-D.")

(Mr. Werle hands the documents to Mr. MacIntyre.)

Mr. MacIntyre: These are immaterial by reason of being cumulative.

Trial Examiner Norwood: You wrote those letters, did you, yourself?

The Witness: I wrote one, Judge.

Trial Examiner Norwood: And these others are letters from your dealers?

The Witness: No, sir; they are from the Carolina Building Material Dealers.

Trial Examiner Norwood: And you consistently took this same action on them, you said?

The Witness: Yes, sir.

39551 (RESP. EX. 3036-A to 3036-D was offered and received in evidence.)

By Mr. Werle:

Q. These exhibits refer to the A. L. Johnson Department Store at Liberty, S. C. Did you cease to sell them as the result of this correspondence?

A. No, sir; we continued to sell them, and still sell them today.

Q. You mentioned there also, I think, that you—something about discussing the matter with some dealers. As to that, do you on occasion discuss problems in connection with your business with your dealers?

A. Oh, we certainly do.

Q. And have you ever come to any understanding or agreement with them as to what you would do or would not do?

A. Not at all. We would discuss a problem with an individual dealer, as we said we would do in this case, in this correspondence.

Q. What, if any, advantage is there to your company, Mr. Dannelly, dealing with dealers only who have certain facilities for service, certain equipment? Will you tell us that just briefly?

39552 A. Well, they are a better outlet for our commodity.

Q. And will you tell me whether or not you have ever been influenced one way or the other in the selection of your dealers or in retaining your dealers by the fact that some competitors have not sold them as dealers?

A. Not at all.

Q. Now, during the period up until 1930, which was the time that your company adopted this 5-cent dealer payment plan, during that period were there certain kinds of work that your company sold direct, and other kinds of work that you sold only to a dealer?

A. Yes, there were.

Q. Do you have any recollection of what they were during that period?

A. Well, with some exceptions, why we—well, we tried at times to market our cement in the dealer's own town except on sales to the United States Government, through a local dealer.

Q. Would you say that that substantially describes the practices that you had during that period?

A. That is right.

Q. Now, there is some evidence in the record indicating that some companies at the time that they discontinued the dealers' service payment plan issued a statement as to the kind of work they would sell direct. Did your company issue any such statement at that time?

39553 A. Not at the same time that they did.

Q. In 1930 or in 1931?

A. No.

Q. I take it, then, that you issued no such statement prior to the appearance of Article XI of the Code?

A. No.

Q. Is that correct?

A. That is correct.

Q. Can you tell me by looking through Article XI of the Code, briefly, whether or not it made any substantial change in the practice of your company in that connection, or whether it did not?

A. No substantial changes. I do not want my answer to tend to convey the idea that our sales policy prior to

this time, that all of our sales were restricted to this sales policy prior to that time, but we in line—there were exceptions to our sales policy.

Q. But by and large, as I understand you, it made no substantial change either in the practices that you continued to follow?

A. That is right.

Q. Is that correct?

A. Yes.

Q. Now, then, after Article XI was suspended, can you tell us to what extent, if any, you continued to follow
39554 the practices outlined there or whether your varied from them?

A. We followed similar practices that we had prior to and during the Article XI.

Q. And will you tell me whether or not your continuation of that was the result of any understanding that you had with my other Respondents that they were going to do it?

A. No.

Q. Now, then, there is a showing in the record of certain announcements issued by various Respondents some time in February of 1935 in connection with direct and dealer sales. Do you recall whether or not your company issued a policy in February of 1935?

A. I think we did, yes.

Q. And can you tell us very briefly the circumstances which caused you to issue that policy?

A. We found in the field a sales policy or policies that had been issued by some of our competitors, and our dealers began to call on us and asked us how we stood, what we were going to do, were we going to issue a sales policy.

Q. And subsequently did you issue a new policy or a restatement of that policy?

A. We did.

39555 The witness identified Resp. Ex. 3037 as a letter dated April 24, 1935 from the Georgia Retail Lumber & Builders' Supply Association addressed to National; Resp. Ex. 3038 as his letter dated April 25, 1935 in reply to the Georgia Lumber & Builders' Supply Association. Both letters were written in the regular course of business and it was the regular course of business for such com-
39556 munications to be written and received. Resp. Exs. 3037 and 3038 express typically the attitude that

National was taking during the period between February and the issuance of its subsequent policy.

The witness identified Resp. Ex. 3039-A and B as a National sales policy issued under date of May 2, 1935.

Q. Now, as to this February policy, did you issue that by reason of any arrangement or understanding or agreement with any other competitors?

A. We did not.

Q. And with respect to Respondents' Exhibit 2039-A and B, was that issued as the result of any arrangement or understanding among yourself and other competitors?

A. No, sir.

39557 He wrote the letter to these dealers of which Resp. Ex. 3038 is a carbon copy. He did not think it was "more or less a form letter" but that it was a direct answer to it. It contains the substance of what he wrote to all the others.

(RESP. EXS. 3037, 3038 and 3039-A and 3039-B were offered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. Dannelly, at any time since May of 1935, have you reissued this policy, which is Respondents' Exhibit 3039-A and B?

A. No, sir.

Q. Will you tell me whether or not since May of 1935 your company has felt obliged in any way to adhere to this policy, and, if so, to what extent?

A. We felt no restriction or obligation to it.

Q. Will you tell me whether since that time you have adhered strictly to it or whether you have deviated from it?

A. Oh, there have been deviations from it, yes.

39558 Q. Can you tell us about some of the deviations, if you can think of any,—any that you might find typical?

A. Well, may I see it?

Q. Yes, surely (handing the exhibit to the witness).

A. We made some deviations under section 2, State Government, for requirements of highway paving contracts.

A. Well, in July, 1935, we sold the State of North Carolina for their requirements on all types of purchases—

will you strike that date out, Judge; I changed the subject there?

Trial Examiner Norwood: Change the date?

The Witness: I was changing the type of customer. In other words, we quoted the North Carolina State Highway Department on their requirements for their highway use, whether it was for grade crossing eliminations or for highway paving contracts or for bridges.

By Mr. Werle:

39559 Q. And was that prior to 1938?

A. Oh, yes, sir.

Q. And can you recall any other items on there from which you had deviated?

A. I recall railroads, filing tariffs with the State and Interstate Commissions, to be sold direct. We sold a little railroad, who had not filed any tariffs with the Interstate Commerce Commission, on a bridge job down in Alabama.

Q. What I am trying to find out is whether or not during the period since you issued this policy you have deviated from time to time, or whether you have been following this?

A. We have tried to follow it.

Q. Now, since—well, prior to the time that you issued that policy, did you attend any meetings with dealers relating to how you would sell?

A. No, sir.

Q. And since the time you issued that policy have you attended any meetings with dealers relating to that?

A. No, sir.

39560 Q. Well, will you tell me, Mr. Dannelly—I am not sure that I have already covered this—but have you or have you not had any understanding, any agreement or any arrangement with anyone—that is, referring to competitors or dealers or some outside agency—as to how you would or would not sell your cement?

A. We have not.

Q. Now, Commission's Exhibit 547-3-W to 3-Z refers to minutes of a district meeting of The Cement Institute in Knoxville in July of 1935, and indicates that you were present.

Will you look over the minutes of that meeting sufficiently to tell me whether or not those minutes accord

with your recollection of what occurred at that meeting? First, let me ask you, do you recall having been present at that meeting?

A. Yes, I do.

39564 Q. Well, Mr. Dannelly, do you recall any discussion at this meeting with respect to the matter of the contract reporting and checking matter in connection with the Southeastern District of the Institute?

A. Yes.

Q. And do you recall whether or not there was a report made by Mr. Reiter, of the Institute, with respect to the activities—the then activities of the Institute pending the abrogation of the N.R.A. Code?

A. Yes.

Q. Have you had any recollection of that?

A. Yes.

Q. Do you recall whether the matter was brought up as to whether or not companies in the area would or would not voluntarily continue to carry out certain of the provisions of the N.R.A. and the N.R.A. Code?

A. I remember some discussions of that.

Q. Do you recall whether or not there was any discussion at the meeting in question with the Tennessee Valley Authority and some matters that were being taken up with the T.V.A. with respect to weights on cars?

A. I remember that matter mentioned, yes.

Q. As to that, were you particularly concerned

39565 with that matter?

A. We were not particularly concerned with that matter, and we were not particularly concerned—I was not paying as close attention to those discussions as I might have been. The president of our company was there, and certainly we were not interested in the T.V.A.; we had none of that business.

Q. Now, let me show you a letter which purports to have been addressed to your company, Commission's Exhibit 547-4-C. Will you tell me whether or not you received that letter?

A. I do not recall receiving it.

Q. Now, will you look at Commission's Exhibit 547-4-D through 4-I, and tell me whether or not you ever saw a document such as that before, and if so, will you tell me where you saw it and what the circumstances were?

A. The first time I saw this document it was in the possession of a competitor. I met him on the streets in Birmingham, and during the conversation he asked me if I had seen this, and he had one in his pocket. I told him no. I did not read it very carefully, but I thought we might be interested, and I asked him if he had an extra one, and if he had to send it over to me.

Q. Now, can you fix the time of that—that is, when it occurred?

A. Possibly about May or June, 1935.

Q. And was this any prearranged meeting with
39568 this competitor you speak of?

A. Oh, no.

Q. Do you recall who it was that you met?

A. It was a representative of the Atlas Company, and my best recollection is it was Fred Wiggins.

Q. Would you tell me whether or not the Atlas Company has an office in Birmingham?

A. Yes, they do.

Q. I understood you to say you asked him to send you a copy; is that correct?

A. I asked him if he had an extra one, and he did not know at the time. He said if he did he would send it over.

Q. And did you subsequently receive a copy of it?

A. I did.

Q. Now, in this conversation that you had with him, how long did that occur—was it a lengthy conversation, or was it short?

A. Oh, it was rather—I recall meeting the man on the street, just stopped and talked to him, and apparently this was something that he had just received or gotten.

Q. Well, did you in that conversation discuss with him the merits of that document?

A. No.

Q. Now, did you see a copy of this document, Commission's Exhibit 547-4-D through 4-I, or anything similar to it, at the meeting of The Cement Institute, District 6, in Knoxville?

39567 A. I did not.

Q. During the period of that district meeting, was there any discussion with respect to direct and dealers' sales?

A. No, sir.

Q. That you recall?

A. No, sir.

Q. Now, will you tell me whether at any time in Knoxville on that day there was any discussion which came to your attention in connection with direct and dealers' sales?

A. Yes, sir; there was.

Q. Would you tell me when that was, how the discussion arose?

A. Well, when The Cement Institute meeting was adjourned some of them had already left, some members, before they adjourned, and some were leaving. Some wise crack was made over in one part of the room about a grading and drainage job that had been sold down in Alabama direct, when the practice had been prior to that time to sell a job of that type through the dealer. I was very much interested in the remark that was made because we had participated in the sale, so I went over and joined the discussion.

Q. Now, was Mr. Ralph Nicholson, the then president of your company, was he present at this discussion?

A. I do not recall that he was. I think he had gone somewhere else in the hotel.

Q. Can you tell us to the best of your recol- 39568 lection who participated in this discussion?

A. It was hard to tell. Some of them had gone, some of them were leaving. I remember Fred Parsons, Ed McGovern, Frank Conkling, and myself, of course, and some of them were in and out while the meeting was going on.

Q. Well, now, let me call your attention to Commission's Exhibit 547-4-J. Do you recall having seen any papers such as that during that discussion or at any time there?

A. Not in the discussion, no.

Q. With respect to the items mentioned on this Commission's Exhibit 547-4-J, will you tell me whether or not the matters referred to on that document, whether that subject matter was discussed on this occasion?

A. Yes. It was more argued than discussed.

Q. Did you participate in that discussion?

A. Well, yes.

Trial Examiner Norwood: Well, what is the matter there,—what was the subject of it?

The Witness: The subject was interpretation that might be placed on methods of sale.

Trial Examiner Norwood: Aren't we doing just exactly what our rules say we should not be doing with respect to that exhibit?

Mr. Werle: I do not quite understand you, Judge.

Trial Examiner Norwood: Read the statement.

39569 (Trial Examiner's statement read.)

Mr. Werle: No, I do not understand.

Trial Examiner Norwood: Showing the witness the exhibit.

Mr. Werle: No. I asked him whether he saw this paper on that occasion, and he said no, and then I asked him whether the subject matter of this paper was discussed.

Trial Examiner Norwood: That is all right.

By Mr. Werle:

Q. I think you said these matters under A, B and C, you do recollect some discussion on that?

A. Yes.

Q. Can you tell me whether or not you expressed any opinion with respect to these items?

A. The only opinion that I expressed there was in reference to selling that drainage and grading project down in North Alabama direct.

Q. Now, what was the outcome of this discussion, Mr. Dannelly?

A. Well, the argument waxed kind of warm, and after some length of time, why, somebody came up with a statement, "Well, here is what I am going to do, and you boys can take it or leave it whether you like it or not," and he expressed his opinion very much in line with what that document there says.

39570 Q. Well, when you referred to "that document"—

A. I mean this particular exhibit, 547-4-J.

Q. Commission's Exhibit 547-4-J.

Trial Examiner Norwood: They were accusing you of violating the Code, were they?

The Witness: Well, the Code was not in effect at that time, Judge, but it was somewhat similar to that.

Trial Examiner Norwood: Accusing you of fudging, though, weren't they?

By Mr. Werle:

Q. Let me ask you whether you made any change in the practices of your company after this occasion when you had this discussion at Knoxville?

A. We did make a change in reference to the particular interpretation of a grading and drainage job as being interpreted as being a paving job, therefore, then, we watched to see what the man was going to do who made the statement there at the meeting, and when we saw that he was quoting that type of work direct, why, we also quoted it direct.

Q. Prior to this occasion, Mr. Dannelly, do you recall whether anybody had been selling that kind of work direct prior to that time?

A. No, we had not; it had not been the practice of any company to do so, but on this particular job, why, after the job was let we ran into the fact that a certain
39571 company had quoted that particular job direct, and we met the competition and shared in the sale of it.

Q. This was prior to this occasion?

A. Oh, yes; it was prior to that argument.

Q. That is, prior to July, 1935?

A. Yes.

Q. July 17th.

Well, now, does your company have any practice with respect to the selling of one dealer at a point other than where he has his place of business?

A. Yes, we do.

Q. Will you just tell me what your practice on that is?

A. We sell the dealer only in the town where his place of business is located.

Q. Now, what is the purpose of doing that, Mr. Dannelly?

A. More or less self preservation, because if we did not follow that procedure the dealers in other towns would not do any business with us, and one by one we would lose them.

Q. How long have you been doing that?

A. Oh, as far back as I can remember; when I came with the company.

Q. Does that policy have any relation to maintaining your prices, or anything of that kind?

A. I do not see how it does.

Q. Well, now, who determines what is the natural mar-
29572 ket for your dealers?

A. Well, the dealer, himself, determines that by his activities, but our company reserves the right to say that we won't sell him anywhere else except where we believe his place of business and his trade area is located.

Q. Now, did that policy—that is, a policy of your company—develop through any agreement or understanding with your dealers?

A. Oh, no.

Q. Did it develop through any agreement or understanding with other cement manufacturers?

A. It did not.

Q. Mr. Dannelly, let me call your attention to Respondents' Exhibit 3018-A, which I think you said was your specific job contract adopted at the time of the N.R.A. Code. There is a clause in that contract in connection with the diversion of cement in transit. Will you tell me whether or not you had any such provision as that in your contract prior to that time?

39573 A. I do not recall that we did.

Q. Mr. Dannelly, will you now look at Commission's Exhibit 584-G, and tell me whether or not that came to your attention?

A. Yes. I saw this.

39579 Q. Mr. Dannelly, just before the recess we were talking about this bill of lading stamp, and preventing diversions.

Will you tell me from the standpoint of the National Cement Company what is your purpose in not permitting the diversions of cement in transit by the customer?

39580 A. Well, of course, your purpose is twofold. One of them is to see that it goes to the point where the purchase is made for delivery, such as the dealer, to keep him from diverting it to another dealer's town.

Q. And is that your only purpose?

A. Well, if a man buys a car of cement for delivery to a certain place, we want it to go to that place because we want to collect the money for our delivered price at that point.

Q. I do not know whether I asked you this before the recess or not, but has the National Cement Company had any understanding or agreement with any of its competitors that it will prevent or discourage diversion of cement in transit?

A. We have not.

Q. Have you entered into any cooperative measures or any measures that you could characterize as such in enforcing this policy of your company against diversions?

A. None that I know of.

Q. Does that statement apply to your use and the continuance of your use of this bill of lading stamp?

A. That is correct.

Q. Now, I think the Burns and Clark questionnaire answer refers to shipments by your company by trucks. As to that, will you just tell me to what extent at any time there has been any trucking from your mill on customers' trucks?

A. There existed for a number of years a local affair there in St. Claire County. Our mill is the largest
39581 industry in there, and Mr. Ralph Nicholson was rather insistent that the dealers close by be permitted to truck from the mill. We permitted that for a while, but discontinued it a few years ago.

Q. At the time that you were doing this, do you know whether or not your competitors at their mills at Boyles, Leeds, and North Birmingham, Ala., were making deliveries to trucks?

A. We had no knowledge of their doing so.

Q. And was your trucking that you had done, was that developed in an effort to meet some competitive condition?

A. It was not.

Q. Now, you say that you permitted certain dealers in your county—is that it?

A. That is correct.

Q. —to take delivery in that fashion. Did you unqualifiedly refuse to let dealers beyond the county take delivery in that fashion?

A. We did.

Q. And when you did permit some of these dealers to take truck delivery, how did you determine the price that you sold it at?

A. We sold at the delivered price by rail in their town less the freight, and permitted them to haul it in their trucks.

Q. Less the rail freight?

A. Yes, less the rail freight.

Q. And at any time did you have any 15-cent charge or other extra charge for truck delivery at your mill?

39582 A. No, sir; we did not.

Q. I think you said that you ceased to permit these dealers in that county to take delivery in that fashion. Can you tell us about when that occurred?

A. I think it occurred in the latter part of 1935 or the early part of 1936. It must have been the latter part of 1935.

Q. And what was your reason for that?

A. Well, the dealer who was getting the cement for less money began to sell it in the other dealer's town, and the dealer in that town said, "Well, we are not going to do any more business with you. This fellow has got no right to come over to our town."

Q. Now, had you discussed this question of truck delivery at any meeting with competitors?

A. No.

Q. Is your present practice of not permitting truck delivery as that—has that come about through any agreement or understanding or cooperative measures with any competitors?

A. No.

Q. Now, in our Burns and Clark questionnaire answer again, Commission's Exhibit 976-10-A, in answer to question 5 appearing on that page, talking about barge delivery to Mississippi River delivery points and you state that that prohibited you from competing for business over on the Mississippi River. Can you explain to me how that prohibited you from competing? Just explain that answer.

3583 A. Well, our plant is not on a navigable stream. Our shipments would have had to go by rail all the way, and we would have had to stand the expense of unloading the cement and put it on a barge because a great deal of the work advertised for on the Mississippi River, the bids were effective for f.o.b. barges.

Trial Examiner Norwood: You get water rates there at Birmingham, don't you?

The Witness: Judge, somehow or another we have never been able to get a competitive rate out of Birmingham. Beyond Birmingham we would have to go to Birmingport, and then if we were to get to the Mississippi River we would have to go all the way down around through Mobile, New Orleans, come back up.

Trial Examiner Norwood: I mean that Birmingham port does give you a lower freight rate?

The Witness: We have never used it. We have never used it to our advantage. Never used it at all.

By Mr. Werle:

Q. You said your plant—how far is that from Birmingham, Mr. Dannelly?

A. About 45 or 47 miles east of Birmingham out in the country with no highways around.

Q. Now, you said you have not been able to get a competitive rate out of Birmingham. What does that mean?

39584 A. Well, perhaps I should restate that we have tried on some work down in Louisiana—our traffic manager has tried to get some rates in there that would enable us to ship by barge and give the contractor as good service as we could by rail. I do not think that our Traffic Manager has ever gotten that barge line on the Warrior River to quote us a price, a through price from Ragland in a rate to Mobile or New Orleans, any point down that way.

Q. Will you tell me whether or not as acting sales manager you were given to understand by the president of your company, or any superior, that your company's practices and policies were to be limited or restricted in any way by The Cement Institute?

A. No, sir.

39585 Q. Now, will you look at Commission's Exhibit 146, which purports to be a letter addressed to your company under date of March 21, 1930. Will you tell me whether or not that letter ever came to your attention—whether it came to your attention at or about that time?

A. I recall the subject matter in the letter as having come to my attention. Whether I saw the letter or whether the president of the company told me the contents of it, I do not know.

Q. There is a reference in the first paragraph of that letter, referring to your conditions and terms of sale in regard to description and specifications of work.

Can you tell me what you understood that to refer to, if you did understand it?

Trial Examiner Norwood: Didn't he say it never had come to his attention?

The Witness: No. I said the subject matter in the letter had come to my attention. I did not know whether I had seen the actual letter or not.

Trial Examiner Norwood: Go ahead.

A. I never did understand what the man was talking about, as our salesman having said we always regard it, in order to have a contract that we had to have specific information on that contract enough to describe the job, where it was, and what sized job it was. Apparently the salesman in his discussion there had got that mixed up with some restriction that he thought that the Institute might be playing on matters of that kind.

39586

Trial Examiner Norwood: Let me see it.

Are you through with it?

Mr. Werle: Yes, Judge (handing the document to the Trial Examiner).

By Mr. Werle:

Q. You say you have always had that requirement of particularizing a job and its requirements. Does that go back to your first connection with the company?

A. Oh, yes.

Q. In 1927?

A. Yes.

Q. Now, I think you have said that you have been either in charge of or in virtual charge of the sales of the National since 1931 or 1932 as acting sales manager.

A. 1928, the latter part.

Q. Now, from that period right on up until the present time, has your company adhered in methods or practices as the result of any pressure by The Cement Institute?

A. No, sir.

Q. Do you recall what action, or whether you took any action in connection with the Commission's Exhibit 146, which I just showed you?

39587

A. Oh, yes.

Q. Would you tell me what you did about it?

A. Well, I was instructed by the president of the company to get hold of our salesman, and his answer there seemed to have a knowledge of The Cement Institute existing, tell him exactly what it was, and that it in no way controlled our marketing of cement.

Q. You said that you were instructed by the president to do that. Did you carry out those instructions?

A. Yes, sir.

Q. And so informed your salesman?

A. Yes, sir.

Q. Now, let me refer you to Commission's Exhibit 561, which is a compendium of Established Terms and Practices. Do you recall that Compendium?

A. Yes, sir.

Q. Will you tell me whether or not you distributed copies of that to your sales force?

A. No, I do not think we did. I am not sure, but I do not think so.

Q. Well, do you understand that there was any obligation on the part of your company to observe the provisions of that document?

A. No, sir.

Q. Would you just look at it sufficiently, begin-
39588 ning on page 12, running through to page 17, will you look at that sufficiently so that you will be able to tell us whether or not there was any provision, or there are any provisions in those pages that had not been a part of the practices or policy of the National Company prior to December of 1935?

A. I do not recall that there are any of them here any different.

Q. Have you attended some of the meetings that have been held, some of The Cement Institute meetings, Mr. Dannelly?

A. Yes, sir.

Q. And at any of the meetings which you have attended has it been any part of the discussion at such meetings to take up matters of prices or price policies?

A. No, sir.

Q. Have you at any time in the operation of your company felt or considered that The Cement Institute was in any way a formulator of the policies of your company?

A. No, sir.

Q. I think the record shows that your company has received the freight rate service of The Cement Institute. Let me ask you as to that what your company did about the freight rates prior to the time that The Cement Institute began to issue the rate books?

A. We had our own.

Q. Now, we talked a moment ago about your
39589 traffic manager, Mr. Stutz. Can you tell us now what his duties are?

A. Well, he has complete charge of traffic, and at the same time all orders come over his desk. He is shipping clerk in addition to being traffic manager.

Q. Now, did you, prior to the time you had the Institute rate service, did you have a traffic manager?

A. Yes, sir.

Q. And can you tell me how his duties compared prior to the time that you had the Institute freight service?

39590 A. He had his hands full in handling traffic. In other words, that is all he did.

Trial Examiner Norwood: Well, was it different after the Institute book?

The Witness: Judge, since that time he has been able to handle shipments. He is shipping clerk.

By Mr. Werle:

Q. Did you have a separate shipping clerk prior to the time you had the Institute rate books?

A. Yes.

Q. And as I understand it you haven't any any longer?

A. No.

Q. Would you say—well, what would you say as to whether or not your company uses the Institute rate books without regard to the correctness or accuracy of the rates?

A. Oh, we use The Cement Institute rate book, which is checked constantly when they come out, and any addendas or changes, by our traffic manager, with the railroad tariffs.

Q. Can you tell me whether or not your traffic manager has discovered any errors in the Institute rate book at any time?

A. Oh, I cannot tell you how many or when. I know he has discovered some because he has discussed them with me.

Q. And can you tell me what has been the practice of your company on such occasions with respect to using the rates?

A. If it was lower than the railroad tariff, we

39591 used it. If it was higher, we used the railroad tariffs.

Q. And will you tell me why that is, if it is lower you might use it?

A. Well, we are afraid somebody else might find it and we want to be as low as the lowest bidder, so we use it.

Q. Now, do you have any understanding—is there any understanding between your company and its competi-

tors regarding the use or the non-use of the Institute freight rate books?

A. None whatever.

Q. What would be the effect, if you know, on your company, based on your experience, if you did not have the Cement Institute rate book to use in your business, what would you do?

A. Well, we would have to make up our own rates from the railroad tariff, or make up our own rate books from the railroad tariff.

By Mr. Werle:

Q. Now, I think also the record shows that your company obtains the statistical service of The Cement Institute.

39592 A. That is true.

Q. Is that correct?

A. Yes.

Q. And will you tell me to what extent, if any, the statistics that you receive are used in controlling or curtailing of production schedules?

A. Well, not that I know of. I have nothing to do with production. I have not seen one of these things in six months.

Q. Tell me this: Is there any particular share of the business that the National Company is satisfied to get?

A. No, sir.

Q. Well, do you recall the several proposed plans for sharing the business under the N.R.A.?

A. No, sir; I do not recall any of them.

Q. Have you at any time had any arrangement with competitor companies for dividing up the business among you?

A. No, sir.

Q. Has there been any time in your experiences that you found any of your competitors were willing to let you have a given share of the business?

39593 A. I never found any willing to let us have anything.

By Mr. Werle:

Q. Now, has imported cement been sold regularly in any of your company's normal markets?

A. Yes.

Q. Can you tell us what areas you are affected by imported cement competition?

A. There is the Atlantic Seaboard and the Gulf border, along the Gulf.

Q. I think the record shows that in that area the imported cement is sold at prices lower than the domestic prices.

Will you tell me whether or not the National Company has attempted to meet the low imported cement prices?

A. We have followed prices downward in those markets, which we presume were attempts to meet the foreign competition.

Q. Now, do any of your dealers sell foreign cement?

A. Well, I expect not any of them are selling very much of it now, but they have sold it in the past.

Q. And have you ever refused to sell any dealer because he sold foreign cement?

A. No, sir.

Q. When you speak of following prices downward, did you have reference to so-called port bases that were established in 1936, I think it was?

A. Yes, sir.

39594 Q. Did you prior to the time that those port bases, so-called, began to be used, did you have any advance notice that that was going to happen?

A. No, sir.

Q. Well, with respect to price changes generally at any time since you have been in charge of the sales of the company, have you had any advance notice directly or indirectly from competitors as to what they were going to do about their prices?

A. I have not.

The witness identified Resp. Ex. 3042 A through Z22 as a file of papers relating to price changes. Most of the quotations are dated in the middle or latter part
39595 of May, 1931. The pencil computations are the handwriting of Mr. Stutz, National's traffic manager.

Q. Will you tell me whether or not you were at that time familiar with the price change to which these documents refer?

A. Oh, yes.

Q. And will you tell me whether or not, as a part of your business, you would have discussed that with Mr. Stutz at that time?

A. Yes.

Q. Will you tell me whether those papers indicate the manner in which your company checks back to find out the nature of the price change when it occurs?

A. That is correct.

Q. And does that file of papers represent the typical manner in which your company does that and has done since it has been in business?

A. Yes, sir.

Mr. Werle: I offer that file in evidence (handing the documents to Mr. MacIntyre).

39598 (RESP. EX. 3042-A to 3042-Z 22 was offered and received in evidence.)

By Mr. Werle:

Q. Now, Mr. Dannelly, just so that it will be clear in the record, there are a number of these documents in which are the computation of Ironton. I assume it is "Iron"?

A. That is right.

Q. There is a circle and then all these other computations, there is no circle. Now, will you just explain that with respect to Ironton, as it appears in the series of these quotations?

A. Apparently Ironton was the bases—that was after checking several others along with this, we could find $1.46 at Ironton, was the constant figure, that these prices related back to.

Q. And that circle around it indicates that on the series of these, as I understand it, the only figure to which by deducting the freight rate some constant can—

A. That is right.

Q. So Ironton had $1.46; is that right?

A. Yes. In that given area, geographical area.

Q. Is the same thing with respect to these others,
39599 where Clinchfield is circled on a group of them, and then North Birmingham is circled, another group; is that correct?

A. Yes, that is correct, related back to several constant figures.

Q. Just so the record will be clear, what are these abbreviations across the top?

A. Leeds, Clinchfield, Charleston, Mitchell, Richard City, and Ironton.

Q. With respect to those points you just named, have all those points at all times been so-called bases?

A. Oh, yes.

Q. Has Clinchfield always been a base?

A. No. None of them have always been a base, no. At one time or another they all have.

Trial Examiner Norwood: Each has at some time been a base?

The Witness: Correct; yes, sir. Thank you.

39600 In paragraph 25 the motion is allowed as to striking the last sentence beginning with "If National attempted to sell cement in a manner so as to obtain," and so forth, to the end of the paragraph, ending "and remain in business," I think that is argumentative and the objection is sustained as to all of paragraph 26.

Mr. Werle: And we have an exception to the ruling?

The witness identified Resp. Ex. 3043 A to M as a file of papers relating to price change in the state of Mississippi in March and April, 1938. The change was an increase in price, which was in turn related to an increase in freight rates, not related to a base change. The practice of National where there is some change or modification of

39602 freight rates in the area where National sells cement, is to get all ready to meet any change with its quotations, but it does not send them out until it finds there are competitive quotations in the field reflecting that change. Resp. Ex. 3043 A to M indicates typically the manner in which National undertakes to find out what is going on with respect to prices when there is a change in freight rates.

Examination by Trial Examiner Norwood.

If he found that the Institute rate book is wrong, in other words, if he found a lower traffic rate, National would reflect that in the price before finding out what somebody else was going to quote.

Resp. Ex. 3043 H is in Mr. Stutz's handwriting.

39603 "Henderson" is a salesman; The same handwriting is on Resp. Ex. 3043 I; Mr. E. W. Russell handwriting is on Resp. Ex. 3043 J. Russell was formerly National's chief clerk who died year before last. The witness was consulted in connection with this particular price change at the time. He wrote Resp. Ex. 3043 A which relates to this situation.

39603 Mr. Werle: I offer this file in evidence (handing the document to Mr. MacIntyre).

Mr. MacIntyre: It is immaterial by way of cumu-
39604 lation. We can speculate that these, for this particular period, are selected so that an argument could be raised that it covers a period within which certain invoices the Commission subpoenaed also follow in an effort to have you rule that they are material.

Mr. Werle: Well, I do not think that question of time relates to immateriality so much. I do think that the fact that they cover a freight rate change which was occurring in March and April of 1938, at the time these invoices were selected by the Commission, that I think they very definitely are relevant and material for that reason, if for no other reason, and I think there are a number of other reasons.

Trial Examiner Norwood: You mean they explain some of those invoices that the Commission has put in evidence?

Mr. Werle: We anticipate this, Judge, that in connection with those invoices some time somewhere we are going to be faced with the charge that there was a freight rate change which occurred at or about that time, and yet nevertheless and notwithstanding every one of these prices at these destinations are identical; that from that is going to be inferred a collusive effort with respect to the freight rate changes, just as collusion is charged with respect to most everything else. When I get finished with
this file I think I will have demonstrated conclu-
39605 sively that the action that this company took in connection with that freight rate change was wholly independent of anybody else except as they were able to find it from what actually was occurring in the field.

The witness identified Resp. Ex. 3044-A to H as a file relating to the same freight rate change. The testimony that he had given with respect to that other file is also applicable to this one. He identified Resp. Ex. 3044-A as his letter. Porter, Henderson and Davis are salesmen. The slip at the end on Resp. Ex. 3044-H is Mr. Stutz's handwriting. That indicates that apparently the slip had been on Stutz's desk and when he first received quotations in the field reflecting the change, he listed the companies that normally served the territory in which the change was
taking place, and as the salesman phoned or sent
39608 in the quotations he jotted down the information as to the effective date on these quotations.

Q. Will you tell me this, as to this particular price change, did you find with your own situation as to what you were going to do, that your prices changed as you discovered new things happening in the field here?

A. Oh, yes, our company was coming out with one, we would push our price up to meet that.

Mr. Werle: I also offer Respondent's Exhibit 3044-A to H at this time (handing the documents to Mr. MacIntyre).

Mr. MacIntyre: We make the same objection to this offer as we made to the preceding offer.

39609 Washington, D. C.,
Tuesday, May 28, 1940.

39610 J. M. DANNELLY, JR., thereupon resumed the stand and testified further as follows:

Trial Examiner Norwood: I have examined this proffer of the Respondents, marked Respondents' Exhibits 3043-A to M and 3044-A to H, for identification. I was surprised to see that they were just the same kind of documents that we have received here to illustrate this method a great many times, and I cannot see that they do more than show the details of figuring the prices according to the method that has been shown many, many times. I cannot see any useful purpose that would be served in the offering of similar documents in the future, in view of my rulings heretofore, as shown in the record at pages 39194, 39199, 39205, 39224, and 39462.

So the objections are sustained to those documents.

39619 By Mr. Werle:

Q. Mr. Dannelly, I would like to call your attention to these Respondents' Exhibits 3043-A to M, and Respondents' Exhibits 3044-A to H, both merely marked for identification, and ask you to tell us,—and if you need to refresh your memory from these documents,—to tell us about the steps that your company took in late March and through April of 1938 in order to determine whether or not your prices reflect certain changes in freight rates which occurred at or about that time?

39620 Is that question clear to you? It was rather long.

A. It was rather a long one. I do not know. I will try to follow it if you keep me on the right track.

Q. All right.

A. Around April 5 some quotations appeared in the field, notice of which we received by our salesmen. We had been looking for a possible change in price at destinations due to the fact that the railroads had advised us of a change in freight rates. As quickly as these quotations were sent into our office we made a sheet, which is customary, of the various companies serving the territory that was to be affected by this possible change in freight rates. As these quotations came in they were checked as to the date of their issuance and the effective date of the change. We were unable, however, to find out what all of our competition was going to do by the few quotations that we had picked up in the field. We had ours in

39621 readiness to send out, and after we received a substantial number of competitors' quotations from the field we issued ours. We were unable, however, even after the issuance of our quotations, to find out the attitude of three or four companies serving that territory, and we advised our salesmen that while we were not withdrawing our quotations at that time we would give them the privilege of meeting the former price, and when we found that most of the quotations were out, we merely shoved up the effective date of our quotations to meet the latest one out.

Q. Do you recall what was the effective date of your new prices when you first issued your quotations?

A. The effective date was April 5.

Q. Was this a price increase or decrease?

A. It was an increase.

Q. An increase?

A. Yes.

Q. Now, then, what— You say that taking the other companies which you had not been able to learn of, did you subsequently find out—did you find quotations from those other companies?

A. Yes, we did.

Q. And will you tell me, then, what was the final effective date of your new prices after you say you had to keep moving them up in this fashion?

A. Well, the final effective date of our price was
39622 in late April, because we had shoved over into May,
to May 9th, as being the last day on which spot shipments to dealers could be made by our salesmen.

Q. Now, will you tell me about that? You say the latest day on which spot shipments could be sent out, I think, shipped?

A. That is right; shipped, yes.

Q. Will you explain just how that works out, please?

A. Well, five days—fifteen days from the effective date of our quotation is the time in which shipments that have been booked prior to that time can be made, and naturally if a quotation comes out that gives a buyer more favorable time in which to have those shipments made we have to meet it, which we did in that case.

Q. Now, you said that your quotations have been sent out after you had ascertained that a number of competitors had sent out quotations; is that true?

A. Yes, that is correct.

Q. And then you said you sent instructions to your salesmen to meet the former price. Will you explain that a little more fully so it is clear as to what you meant there?

A. Well, we naturally wanted to meet the increase in destination prices because we did not want to have to pay this extra freight, ourselves. There were three or four companies who had not yet sent out any quotations. Naturally, we wanted to be competitive with them, and
39623 if they wanted to quote the old price, we would meet it until they decided to quote the new price.

Q. So am I correct in understanding that the effect of that was that your increases, represented by your new quotations, had no effect during this interval of time?

A. Oh, no, because we were going to offer to sell—

Trial Examiner Norwood: Well, where he found the price did reflect the increase of freight, he met that, and where he found it did not, he met that; isn't that right?

The Witness: Yes; it only applied, I believe, to one State, or part of one State, and as long as the buyers were aware that there were any companies who were still quoting a price after the increase in freight, why, naturally, they bought—

Trial Examiner Norwood: Wasn't that the situation that my question went to?

The Witness: I might say this, Judge, that until the

last man came out with the prices we were unable to get the prices that we had originally sent out quotations on.

Trial Examiner Norwood: You sent out quotations which included the higher freight?

The Witness: Yes, sir.

Trial Examiner Norwood: And your salesmen
39624 were instructed to make that quotation, but where you found that the dealer had another quotation which did not include the difference in freight, then he met that quotation?

The Witness: Yes, sir.

Trial Examiner Norwood: That is right.

Go ahead.

By Mr. Werle:

Q. Just as to that, as a practical matter, did you find that there were certain places where you were able to get the increase and certain places where you were not?

A. No; we could not get the increase.

Q. At any point; is that correct?

A. No. Your statement is correct. My answer of "No" meant that we could not get the increase.

Q. Now, in connection with this question of freight rate, you said that the railroads had given advance notice of the change in freight rate that was going to occur; is that the usual practice?

A. That is what I understand is the usual practice.

Q. Now, in any such cases as that, has the National Company, however, ever learned beforehand what competitors are going to do about the change in freight rate?

A. No, we do not. We keep ourselves in readiness to meet it both ways. We frequently have our quota-
39625 tions made out ready to send out, but there have been times when we haven't sent them out because we haven't found a change in the field.

Q. Now, this keeping of quotations in readiness, you referred to that once or twice. Will you tell me what is the reason that you have them ready beforehand? What is the necessity for speed, if there is any necessity for speed?

A. Why, I do not necessarily mean on every price change we have quotations ready, because we cannot tell when price changes are going to take place, but in a case where the railroads have already informed you of changes,

then we keep ourselves in readiness to meet any change resulting from a change in freight rate.

Q. Now, has your company had the policy of quoting delivered prices ever since you have been with it?

A. Yes.

Q. And what exceptions have you made to that policy or practice?

A. The United States Government, and to those cases we mentioned yesterday about St. Claire County.

Q. Now, who in your company, at the present time, determines what your price policy will be?

A. You mean as to whether we quote?

Q. Delivered price or some other kind of price.

A. I do.

Q. Tell me about this town in which your mill is
39626 located, Ragland, Ala., what is the population of Ragland?

A. Oh, about 500 people.

Q. Do you find any cement market at Ragland?

A. There is no cement market there.

Q. Do you, however, sell cement there occasionally?

A. We let our employees have it. We do not have any other source, though, of sale.

Q. When you sell it to your employees there, how do you determine the price?

A. We have a special price to our employees that was given them before Mr. Ralph Nicholson's death, and we have continued to sell it at that price.

39627 Q. Now, tell us briefly the method which your company has used to quote railroads?

A. We have quoted railroads either for destination or f.o.b. their tracks.

Q. Now, I think you said the Seaboard Air Line Railroad served your mill?

A. Yes, sir.

Q. Would you tell me whether or not you sell the Seaboard Air Line Railroad f.o.b. the mill?

A. Well, we would sell them that way, but recently they have been buying, though, f.o.b. destination.

Q. Now, you said a moment ago that you make exception to your policy of delivered prices in the case of the United States Government, that you sold the Government f.o.b. the mill; is that correct?

A. Yes, sir; we have.

Q. And can you tell us over what period of time that that has been so?

A. As a general practice, ever since I have been with the company.

Q. And what has been the reason why you sell the Government at f.o.b. mill prices, when your general practice or policy is to make delivered prices?

A. Well, our main reason was because we found that our competition was so doing, and we wanted to give
39628 the Government the availability of land-grant rates.

Q. Now, the National Company is a price follower, is it not, Mr. Dannelly?

A. Yes, sir; we are, to use that term.

Mr. Werle: I think at this point it might save us a little time if Counsel for the Commission would agree to stipulate at this time that Mr. Dannelly would testify to the same effect as witnesses of other Respondents, on direct examination; that is, that the National Company attempts to meet the lowest price it finds in the field, and it learns of these prices being quoted throughout the area where it sells through reports from its salesmen and customers, through abstracts of bids, and the other testimony to that effect.

Mr. MacIntyre: We will agree that Mr. Dannelly would so testify providing that the other testimony that he has given and will give before he leaves the stand modifies that testimony.

Trial Examiner Norwood: Does not modify, you mean?

Mr. MacIntyre: No, that it is modified in accordance with the testimony that he has given and will give before he leaves the stand.

Mr. Werle: You mean it is subject to cross-examination?

Trial Examiner Norwood: Yes.

39629. Mr. MacIntyre: And to such modifications as he has made already on his direct.

Mr. Werle: Well, that would have to be so.

Trial Examiner Norwood: Yes.

Go ahead.

By Mr. Merle:

Q. Now, except during the period perhaps when you participated in open price filing, Mr. Dannelly, has there been any time when you could know what your competitors' prices were going to be?

A. No, sir.

Q. Referring to the Burns and Clark questionnaire answer again, Commission's Exhibit 976-10-E, indicates that as of that time the National mill was a non-base mill, so-called; is that correct?

A. Yes, sir.

Q. And has its status changed?

A. No, sir.

Q. Now, you were asked in this questionnaire to give the reason for that, Mr. Dannelly, and the reasons shown on your questionnaire answer for the mill not having been a base point mill was close proximity to the Birmingham district and Leeds, which are base mills made it unnecessary for us. Will you explain that, or state how it was unnecessary and what you had in mind there?

39630 A. Well, I think what we had in mind there was the fact that close proximity to these mills would not make any marked changes in destination price of our product because certainly we would not care to make that mill any lower, and we could not possibly—we could not make it any higher and get any business. We have no large consuming areas surrounding our plant that would be benefited by any lower price.

Q. Is Birmingham the largest consuming area for your mill?

A. Yes.

Q. Your company's answer to the Federal Trade Commission's questionnaire in 1931, Mr. Dannelly, shows certain bases that had an effect on prices in your area, I think, as of that time. Will you look over that list—I think there are twenty shown there—and tell me whether or not that list has remained static during the period that you have been with the company, or have there been changes one way or the other?

A. There have been changes; yes.

Q. Are there any bases which have affected your company since 1931, which do not appear on the list?

A. I do not see Spocari listed.

Q. That is Spocari, Ala.?

A. Spocari, Ala. That is a base.

Q. And it has been since, when, if you can recall, Mr. Dannelly?

A. Well, I think at one time, Mr. Werle, back in 39631 1928, it was a base, and then it was not a base, and along about last year it was made a base.

Q. Are there any others?

A. I believe not.

Q. Perhaps I can refresh your recollection. Is Clinchfield, Ga., on there?

A. Yes; Clinchfield, Ga., is on there.

Q. Is Phoenixville, Ala., on there?

A. No; it is not, and it is a base.

Q. Do you think of any others, in addition to those three, that have since affected prices in your area?

A. No, sir.

By Mr. Werle:

Q. Now, with respect to these bases that are listed in your answer to the Federal Trade Commission
39632 questionnaire, and in respect to the additional ones which you mentioned that have affected you since 1931, will you tell me whether or not your company has had any understanding of any kind with any competitor that you would or would not recognize these points or any other points as basing points?

A. No, sir.

Q. Have you had any understanding or arrangement of any kind that these mill locations and the points listed here would govern or control prices at any particular points at any particular time?

A. No, sir.

Q. Have you had any understanding or any arrangement with competitor companies with respect to the basis that would be used at any of these points?

A. No, sir.

Q. Has there been in your experience, in the area in which you sell, any one company that has consistently assumed to be the price leader?

A. No, sir.

Q. As a matter of fact, are you able to tell always, on the occasion of a change in price, which company was the one that led off?

A. No, sir.

Q. Will you explain how that is?

39633 A. For example, we may find the Lone Star quoting in the field, and the Lone Star may not have been the first company that sent out a quotation, but they may be the first quotation that we would pick up.

By Mr. Werle:

Q. I see.

Has the National Company at any time exercised, or attempted to exercise, any leadership in changing prices upward or downward?

A. No, sir.

Q. Can you tell me why not?

A. Well, we have been a price follower. We have never—

Q. Well, have you had any understanding with any other Respondent that you would not exercise price leadership?

A. Oh, no, no.

Q. Your company, I believe the record shows, sends out printed quotations to its trade.

A. Yes, sir.

Q. Showing its prices.

A. Yes, sir.

39634 Q. Will you tell me on what occasion you send them out?

A. On any occasion of a change in price of one of our competitors.

Q. How long has the National Company been sending out printed quotations of its prices?

A. They were doing that when I came with the company, and we have continued.

Q. That is, as early as 1927, to your knowledge?

A. Yes, sir.

Q. Has the National had any arrangement or understanding with any other companies that it would send out its prices in printed quotation form?

A. No, sir.

Q. Now, has your company ever had any understanding or agreement or compulsion, except, perhaps, during the period of the N. R. A., that your company would adhere to its printed quotations?

A. No, sir.

Q. Have you always adhered to your printed quotations, or have you deviated from them at times?

A. There have been times when we deviated, both as to price and policy.

Q. Can you tell me under what circumstances you do deviate?

Mr. MacIntyre: I object, unless the time, place, and

names of the parties are cited. We have no way,
39635 except for that, to know whether it was before the complaint was issued, or whether we would ever have any possibility of meeting it.

Trial Examiner Norwood: I think you should give the particular facts here, instead of generalizations.

By Mr. Werle:

Q. Well, Mr. Dannelly, do you recall any instance where you have deviated from your printed quotations?

A. I cannot give you the definite time and place. I could give you in generalities what it was. I could give you the name of the customer and the type of work, but I could not give you any definite time on it.

Trial Examiner Norwood: Can you give the approximate time?

The Witness: Oh, I recall during the so-called price war in Mississippi, we had a very good long-time customer—

Mr. MacIntyre: I am sorry, but that does not fix the time. We want at least the year or the half year in which it occurred, and I object unless that is shown.

Trial Examiner Norwood: When was that?

The Witness: Well, in 1938.

Mr. MacIntyre: I move that the answer be stricken. It shows that it was subsequent to the complaint.

Trial Examiner Norwood: Let him complete the
39636 answer there and then I will consider your motion.

The Witness: Barber Brothers—

Trial Examiner Norwood: I shall allow that motion. That is after the issuance of the complaint.

Mr. Werle: We except to that, because the Government has gone beyond the complaint.

Trial Examiner Norwood: Yes; that is your privilege.

Mr. Werle: From time to time.

Trial Examiner Norwood: Go ahead.

By Mr. Werle:

Q. Mr. Dannelly, would you see if you can recall any that may have occurred prior to July, 1937?

A. We bid prior to that time one cent lower to the Alabama State Highway Department on 34,000 barrels of cement.

39637 Trial Examiner Norwood: Can you state the approximate time of that circumstance?

The Witness: I would say in 1932.

By Mr. Werle:

Q. Can you recall at this time any other times that you have deviated?

A. Well, there are more ways of giving the buyer the advantage of price, necessarily, than a lower price. I can think of ways in which we give buyers the advantage of a saving.

Q. Will you explain some of those, if you can think of a particular one that will satisfy the objection?

Mr. MacIntyre: I object.

Trial Examiner Norwood: Sustained.

Mr. Werle: May I ask what the ground is, please?

Trial Examiner Norwood: I do not think any kind 39638 of competition is in issue here but price competition.

Mr. Werle: May we hear what the witness has said on that?

Trial Examiner Norwood: I think his answer went to other than price competition.

Read it.

(Answer read.)

Mr. Werle: A "saving," it seems to me, is talking in terms of dollars and cents. I assume that it what you had reference to?

The Witness: That is right.

Mr. Werle: I think the witness should be permitted

Trial Examiner Norwood: What kind of savings are you referring to?

The Witness: On this particular job the contractor had written a contract for a job, and the amount of the contract was overwritten. It was six or seven thousand barrels. Subsequently, there was a change in the market price of our product at another point where this contractor got an additional job. We shipped him the 6,000 barrels which had been overwritten on his first job at the lower price, to the last job that he had secured, which was gotten after the increase in price had taken place.

Trial Examiner Norwood: That was a price 39639 concession?

The Witness: Yes, sir, it was. That is what I meant it to be.

By Mr. Werle:

Q. When you said that you overcontracted—is that the term you used?

A. The contract was overwritten. In other words, it was estimated there had been, say, 25,000, and they only shipped eighteen or nineteen thousand barrels.

39640 Q. Now, Mr. Dannelly, without telling in answer to this question the nature of the information, will you tell me whether or not any information has come to your attention that your competitors have given concessions in price?

A. Yes.

Q. Now, will you tell me how that information comes to your attention?

A. It comes to our attention through contractor friends and from your dealer friends who tell you verbally, of course, in these instances.

Q. Well, let me ask you this question, Mr. Dannelly: Did you get any information with respect to your
39641 competitors' prices other than the information you get from your customers?

A. From your customers.

Q. And that is so with respect to open prices as well as prices which may be termed "secret"; is that correct?

A. Correct.

Q. Will you tell me when you have information from your customers with respect to prices quoted to them, that have not been open, how do you determine what factors do you consider in deciding whether or not you will attempt to meet these prices?

A. We do not attempt, Mr. Werle, to meet every price, every concession that we hear of in the field, and there have been times when we have known reasonably sure that those concessions or prices have been given when we did not meet them.

Trial Examiner Norwood: Well, in some of these reports, however, have you ever run those out and found that they were not true?

The Witness: Well, that is very true; that is entirely possible.

Trial Examiner Norwood: Somebody was bargaining with you?

The Witness: There is no way for us to run them out to find out whether they are true or not except to follow the result of these rumors, to see if sales have taken place on the basis of those rumors. We never see a
39642 black and white concession by a customer written down.

By Mr. Werle:

Q. Well, in connection with that last answer, Mr. Donnelly, you say you follow it down. How do you judge whether or not the information which came to your attention was correct or whether it was just merely some rumor?

A. Oh, it is very rare that you can conclusively prove that a sale took place on a special price.

Q. But your judgment, as I understand it, is exercised on the basis of whether or not the business did go with the competitor that you heard about it; is that it?

A. That is it, yes.

39649 By Mr. Werle:

Q. I think you mentioned the indefiniteness of the quantity to be called for under the contract if the contract was obtained. Have you quoted State Governments
39650 or other agencies where indefinite requirements were called for?

A. Oh, yes; we have quoted both the State Government and we have quoted concrete block plants and pipe plants or products plants.

Q. Will you explain why the provisions of this invitation in that connection were objectionable to you, and how do you distinguish them from the other contract requirements of that character?

A. Well, we find that in requirements contracts that we have taken, for instance, that in the State Highway Department there is an engineering department there, through which you can check to some close proximity on the amount of cement that they are going to use. In a concrete pipe or products plant, frequently you can check with them the amount of orders they have on hand, and quite frequently you can handle it in another way, by charging off of your commitments so much as time goes on, but you are still subject to that cement—the purchase of it.

Q. In connection with the State highway requirements, how are you able to make some check that enables you to determine the extent of the requirements?

A. Well, past experience gives us some insight into that, as well as going to the highway department and finding out the program for that year, which is very frequently, and nearly always, stated in advance.

Q. And is that normally available to you?

39651 A. Oh, yes.

Q. Now, after this quotation came to your attention, Commission's Exhibit 1339, did you take it up with any of your competitors?

A. No, sir.

Q. Did you know what other companies were going to do, whether they were going to bid on it or not?

A. We did not.

Q. Let me ask you whether or not in not bidding on this invitation, you were continuing any practice or policy of your company?

A. Yes; we were continuing the practice and policy of protecting our dealers in that location.

Q. Was there any other practice or policy that you were continuing in not bidding on it?

A. We were continuing the practice and policy of having a contract as to the destination and as to where it was going to be used, and how.

Q. I think the record shows, Mr. Dunnelly, that your company on bids to the Federal Government, when land-grant rates were involved, has employed a control clause from time to time. Will you tell us as briefly as you can the circumstances under which you began to use that clause?

39652 A. During the open price filing with the N.R.A., we found that one of the companies filed a price with the destination cost clause as part of their bid—as part of their price.

Q. Now, did you, during the Code period, understand that your company was restricted in any way to meet or adopt the prices and terms that were filed by someone else?

A. Oh, no.

Q. What was your understanding with respect to that?

A. It was our understanding that we could quote any prices that we wanted to, provided we had filed that price with the Code Authority.

Q. Now, with respect to the control clause, was there any compulsion brought to bear against you or your company, that you had to use such a clause as that?

A. No.

Q. When you did use that clause in your bid, did you do that as the result of any understanding or agreement with competitor companies?

A. We did not.

Q. Now, prior to your use of this control clause, so-

called, how did your company bid on invitations of the Federal Government which asked for mill prices?

A. It was our policy to quote f.o.b. mill.

Q. Do you recall how you determined the mill price which you quoted prior to the time that you began
39653 to quote the mill price through the use of the control clause?

A. Mill price?

Q. Yes.

A. We tried to figure, to the best of our knowledge, what our competitor—the lowest bid that would be made by one of our competitors, and back that up to our mill.

Q. When you say back it up to your mill, will you describe what is meant by that?

A. I mean by that, deducting from the price we figure on, the lowest bid of our competitor, deducting from that price the land-grant rate back to our mill.

Q. Now, will you explain as briefly as you can the way in which you try to estimate what would be the lowest price that a competitor of yours would bid?

A. We try to find out—we try to calculate which combination of the mill base, plus the freight rate to a given point, would be the lowest. We would take that mill base then, and add to that what, to the best of our knowledge, was the land-grant rate, which would give what we term the destination cost. We would bid that price and give the Government the privilege of deducting from that price the land-grant rate from our mill to that point.

Q. This was prior to the time that you began to use a control clause?

A. I beg your pardon. I thought you were ask-
39654 ing me about the control clause.

Q. No, I had reference to prior to that time.

A. Prior to that we simply tried to ascertain what our competitor was going to bid, the lowest competitor, and from that we deducted the land-grant rate from that price back to our mill, and we got the f.o.b. mill price that way.

Q. During the entire period that you had to give consideration to the land-grant rates, will you tell us what your sources have been of obtaining those rates?

A. Well, in some instances, we have gotten them from the Government itself; others, from railroads. For a while we got some rates from The Cement Institute, and then we keep a tabulation, and have kept it for a long time, of

previous bids, from which we can easily ascertain the land-grant rates.

Q. Then, throughout the period of the N.R.A., did you use this control clause in all of your bids where land-grant rates were involved?

A. We did as soon as we saw the filing.

Q. After the N.R.A., did you continue to use it, or what did you do?

A. We have used it nearly all the time. On some bids we quoted f.o.b. mill price in our bid, rather than destination cost.

Q. Now, you say that sometimes you have quoted a mill price without the control clause. How do you deter-
39655 mine whether to use this clause on your bid or whether not to use it?

Trial Examiner Norwood: Well, I will ask the witness to confine each and every answer to the period before July 2, 1937.

The Witness: I think they would apply both before that time and since that time, Judge; so I think they would come within the scope of the complaint.

39656 A. Well, that was usually determined by what we would judge the strongest trend of our competitors. If we find quite a number of them going over to f.o.b., strictly into f.o.b. mill price in their bidding, then we would follow that. If we found the trend was otherwise, we would follow it with the destination cost.

By Mr. Werle:

Q. Did you know ahead of a given bid which way any competitor would quote?

A. No.

Q. And I understand you found it out by seeing what they had done?

A. Yes, by tabulation of bids.

Q. Now, have you had any arrangements with your competitors, any understanding, so that you would know ahead of time which way they were going to do it?

A. No, sir.

Q. And would you tell me whether or not you found that all competitors have always bid the same way in this connection?

A. No, sir.

Q. I asked you before about sources of land-grant information. Do you get them from your competitors?

A. No, sir.

39662 Q. I want to refer back, Mr. Dannelly, to some of your contract forms that we were talking about yesterday.

Generally speaking, Mr. Dannelly, can you tell me what has been the source of the provisions that appear in your contract forms, particularly the ones prior to the time of the N.R.A. Code?

A. Well, naturally, when I came back into the office of the National Cement from in the field, they had a supply of contracts, and we continued to use those. When your supply of contracts gave out, you always check over to see if there are any changes in appearance and wording of contracts that you would like to make, and, naturally, we made any changes in the contracts, we wanted them to carry with them as favorable conditions of purchase as we
39663 had found our competitors were offering in the field.

Q. Now, yesterday, with reference to this discussion you had at Knoxville with some other people in connection with certain contract and dealer sales, you said that—I think you used the expression that the argument got pretty heated.

Will you ell me just what the argument was about that you were describing?

A. Well, the thing started by somebody saying that somebody else that didn't have any better sense than to think that the old pavement meant a gravel surface or sand-clay surface on the road; that he himself couldn't interpret that as being any sort of pavement, and then the argument drifted on to, well, if a blacktop surface is a pavement, why, then, a gravel top ought to be a pavement, and it was rather a ridiculous argument, and because of its ridiculousness I guess is the reason somebody got warm and het up over it.

Q. Now, with respect to that same subject matter, one company having sold that kind of work direct, could your company have continued to sell it through a dealer after that time?

A. No, no, not unless you would stand in so well with the dealer that he would be willing to take it at cost just to save your reputation for confining all of your activities to your sales policy, and that is a very, very infrequent thing.

39667 The witness identified Resp. Ex. 3047 as a sheet from the Louisiana price book of National which shows National's commercial prices at Monroe, Louisiana as of August, 1937. This was the price quoted on this invitation at Monroe, Louisiana; the price on the price sheet—all those prices—are in cloth. With respect to Respondents' Exhibit 3047, National has been keeping a book such as is typified by this one sheet that we
39668 have been discussing, as long as Mr. Stutz has been with the company. He started that, and the first knowledge that the witness had of it was in 1927. "He started it soon after that date. The exact date, I don't know."

Mr. Werle: I will offer Respondents' Exhibit 3047 in evidence.

Mr. MacIntyre: If Your Honor please, my objection to the materiality of the question, really, should have been to the entire line, and that goes to the offer now pending, as well. I do not know whether you have realized it or not, but this is nothing more than the so-called price card, on which we have taken up many, many hours in this hearing. They happen to be in the form of pages and books instead of small pocket cards. It all goes to the method of bookkeeping and record keeping of the company, and nothing else, and not as to any issues in this case.

39669 Trial Examiner Norwood: Well, it is bound book. Objection sustained.

39675 Q. Now, I want to refer to Commission's Exhibit 171-A to L, which is an abstract of bids opened by the War Department in September of 1935, and ask you whether Respondents' Exhibit 3050-A to K, refers to that bid of your company, whether it is the bid file of your company?

A. Yes, sir; it is.

Q. And will you look at Commission's Exhibit 820-1-H, and tell me if you can whether or not that was used in connection with arriving at your price on that War Department bid?

A. That is correct.

Q. And will you tell me whether or not this file, Respondents' Exhibit 3050-A, together with this filing of the Trade Practice Committee, illustrates the manner in which you determined your destination costs where land-grant rates were involved during the period of price filing?

A. It does.

39676 (RESP. EX. 3050-A to 3050-K was offered and received in evidence.)

39699 By Mr. Werle:

Q. Mr. Dannelly, during what period would these price books show your commercial price?

A. The best I could recall would be that Mr. Stutz started those price books when he came in there, which is around 1927 or 1928. How soon after that he got those in shape, I do not know. That would run possibly back to 1930.

Q. Well, they show your current prices at destinations at the time you filed prices with the Code Authority, as shown in Commission's Exhibit 408, which I just called your attention to?

A. Yes, sir.

39705 Q. Mr. Dannelly, let me ask you whether or not your company has any arrangement or understanding or agreement with any other Respondent as to 39706 the manner in which it would quote its prices?

A. No.

Q. Have you had any understanding or arrangement or agreement with any other Respondent with respect to whether or not you would not quote f. o. b. mill prices?

A. No, sir.

Q. Have you had any understanding or arrangement or agreement with any other Respondent with respect to whether or not you would use basing points in connection with quotations of your prices?

A. No, sir.

Q. Have you had any understanding or agreement or arrangement with any other Respondent with respect to whether or not you would make truck deliveries at your mill?

A. No, sir.

Q. At the time of some of these port prices which you mentioned were put into effect, did you meet those prices as part of any collusive or cooperative scheme with any of the other Respondents?

A. We did not.

Q. With respect to the provisions that you have in your specific job contract adopted under the N.R.A. Code, concerning the diversion of cement in transit, have you

had any understanding that you would continue
39707 such a provision [redacted] that, or continue to prevent diversions?

A. No, sir.

(The foregoing testimony beginning "With respect to the provisions that you" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

Cross-Examination by Mr. MacIntyre.

Q. Mr. Dannelly, in your replies to Mr. Werle as to whether or not you had had any understanding with your competitors to quote delivered prices or not to quote the f. o. b. mill prices, did you intend your answer there to cover your entire company, or just you, personally?

A. The entire company.

Q. And did you in that connection intend it to mean that you had no understandings or discussions or communications with your competitors or representatives of your competitors that you would not quote f. o. b. mill prices?

A. I did not recall ever having made—

Q. I did not understand.

A. I do not recall ever having made any myself, or any having been made by the company.

Q. Well, in connection with your answer on that point, you have not taken into consideration the first paragraph of Commission's Exhibit 768-B, a letter from your president, Ralph E. Nicholson, to Mr. B. H. Rader, of the Lehigh Company, did you,—the paragraph that reads,
39708 "In the long distance conversation between the writer at Birmingham and the secretary of the Code Authority in Chicago, on March 31, 1934, the writer was advised that the Code Authority did not desire f. o. b. mill prices filed on Government lettings."

A. Well, I knew nothing of the letter, and, of course, there were actions taken under the Code that reflect less independence of action, although we were privileged to do as we pleased under the Code Authority; there were certain recommendations there that would have more influence on our actions than when the Code was not in effect.

Q. Well, there are things such as these that took place,

that you did not take into account in your answer to Mr. Werle.

A. I had not seen it and I could not take it into account.

39709 Q. In that connection, do you mean to testify that you took into account all conversations and communications that passed between Mr. Nicholson, the president of your company, and his competitors?

A. I cannot take into account anything that I do not know. I testified that I never had any such understanding, and I do not recall anybody in our company ever having had such understanding. If they had it, it is beyond my knowledge. I do not recall it. I never knew it at the time.

Q. You want to restrict your testimony now that you gave in reply to Mr. Werle's questions to those matters in your company that were called to your attention by other officers of your company; is that correct?

A. My testimony is restricted to those events that I know of that transpired for the company.

Q. Now, referring to this letter of February 6, 1934, that you wrote Mr. Betts in North Carolina, it is

39710 Respondents' Exhibit, now, 3054, telling him that you did not deisre to submit anything other than delivered prices, and you were not submitting anything other than delivered prices in your quotations and bids; can you now say that your action in that respect was or was not influenced by the communications between Mr. Nicholson, and Mr. Rader, of the Lehigh Company?

A. I cannot—

Mr. Werle: Just a minute.

I object to the question; first, because of its form, and, secondly, because it misstates Respondents' Exhibit 3054, which has not been called to the witness' attention.

Mr. Werle: I think the letter speaks for itself (handing the document to the Trial Examiner).

Mr. MacIntyre: Well, I would like to ask the witness a further question on the letter.

Trial Commissioner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Didn't you tell Mr. Betts in that letter that

39711 you did not desire to submit anything but f. o. b. destination prices and that that is all you were submitting?

A. Let me see the letter. I have not seen that letter, May I?

Trial Examiner Norwood: Yes. Just a minute.

By Mr. MacIntyre:

Q. Isn't that the substance of the letter?

A. I won't say until I read the letter.

Trial Examiner Norwood: Well, I think the Counsel has not got the language exactly as stated.

A. I merely said that in our opinion that under the Code we were prevented from quoting in accordance with his proposal which did not call for points of delivery.

By Mr. MacIntyre:

Q. Is it your opinion that you did not or did not desire to submit the prices that he had called for?

A. Well, we did not do it.

Q. Well did you desire to do so?

A. Well, I cannot go back that far and express my desires on it.

Q. You did not do it, did you?

A. No, sir; I did not.

Q. Now, was your action in not submitting it influenced to any degree by communications or conversations between Mr. Nicholson, of your company, and Mr.
39712 Rader, of the Lehigh Company?

A. My action was influenced by my instructions, of Mr. Nicholson, to bid in conformance with what we then thought to be the provisions of the Code.

Q. And you know that he had conversations with Mr. Rader, of the Lehigh Company?

A. Yes, he had some conversations from time to time, but whether he had concerning this or not, I said this morning I could not testify.

39713 Q. Now, as to the date on which you discussed with Mr. Betts the matter of your submitting a bid in 1932 at basing points—

A. Yes.

Q. —do you recall your testimony as to that conversation?

A. Yes, sir.

Q. Isn't it a fact, Mr. Dannelly, that you have used basing points and basing-point prices in submitting delivered price quotations long before that conversation with Mr. Betts?

A. No, sir. We had used the delivered prices that we find in the field from which to make our price.

Q. Is it your testimony now, Mr. Dannelly, that previous to the conversation you had with Mr. Betts in 1932 that you had never used a basing-point figure in calculating a delivered price that you quoted to the State of North Carolina?

A. Oh, yes, we had, but we found those prices in the field and checked them to see how they were related back to a constant point.

Q. And had calculated back, then, to other destinations in quoting delivered prices to him?

A. You are right.

Q. So you had used basing points and basing-point prices before that conversation with him in 1932.

A. Yes. All right, if you want it that way.

Q. Now, referring to this Commission's Exhibit 39714 1099-W of your bid, Respondents' Exhibit 3051-A to I, that is that Navy Department, May 1927, for Pensacola; do you recall it?

A. No, I do not.

Q. Where the arbitrary delivered price there was lower than the basing-point price plus freight.

A. Well, no, as I recall in our bid our prices were the same on both methods, destination cost or destination price. Am I correct that,—from the bid that was shown me this morning, our prices were the same?

Q. That is, your Government destination cost was the same as the commercial delivered prices?

A. Yes.

Q. I understood it was lower. We will look at it (handing documents to the witness).

A. I have a form and everything except the bid itself. (Mr. MacIntyre hands another paper to the witness.)

A. Both prices were $2.40 per barrel here.

By Mr. MacIntyre:

Q. The usual practice of quoting a destination price that is equal to the basing-point price plus rail freight does bring into play some lower Government destination cost when land-grant rates are taken into consideration, though, doesn't it, Mr. Dannelly?

A. It is possible, yes.

By Mr. MacIntyre:

Q. Isn't it the fact that it is the usual thing?

A. In a large number of cases, it is, yes.

Q. In a majority, isn't it?

A. Well, I imagine it is.

Q. Now, referring to this conversation that you and Mr. Wilkinson of the Pennsylvania-Dixie Cement Corporation and Mr. Conklin of the Signal Mountain Company had in Atlanta, with Mr. Harmon, is our understanding correct that Mr. Wilkerson invited you to go to that conference?

A. Mr. MacIntyre, I do not know which one did. I know I was talking to both of them that day, and one of them said Mr. Harmon wanted to discuss with some cement men some problem, and I was asked to go up there, and I went up with the two of them.

39716 Q. It is your testimony either Mr. Conklin or Mr. Wilkerson invited you?

A. Yes, sir.

Q. Mr. Dannelly, what did Mr. Wilkerson or Mr. Conklin say when they invited you to this conference?

A. They said that Mr. Harmon was very anxious to talk over some problem about Government bills of lading, with reference to the dealers and their relationship to cement companies.

Q. Did they say something else?

A. Not that I recall. They may have.

Q. Did they tell you what they thought of the exchange of bills of lading?

A. I don't think they knew, if it was discussed. I know it had been mentioned there while we were waiting to see Mr. Harmon, or after we got into the office and were waiting for him to come in. There was some confusion. Harmon wanted to find out. He couldn't get information on it.

Q. Did Mr. Wilkerson express to you that it was something that was confused?

A. No. I am not trying to evade your question,
39717 but when you ask if one man asked me some particular thing, I cannot tell you which one asked me which.

Q. Did Mr. Conklin or Mr. Wilkerson state that?

A. State what, now?

Q. Did he make the statement to the effect that the situation was confused, over these exchanges of bills of lading?

A. Well, Mr. Harman seemed to be confused about it.

Q. Did not Mr. Wilkerson make such a statement?

A. I cannot tell you whether Mr. Wilkerson made a statement. One or the other said there was some confusion existing.

Q. You told us this morning that you had discussed such things, probably, in the hotel lobby with some of these men previously, and even subsequent to your conferences. Will you tell us where those conferences were held, and what was said?

A. I can't tell you where they were held, and I can't tell you what was said. There was considerable discussion. It might have been at one time when some company had an experience with a dealer sending a Government bill of lading to them, and naturally in the talk of the shop, that goes around, maybe two or three of them had a conversation, Mr. MacIntyre, as to whether it was possible under the law, or whether it was a practical thing to do.

Q. In connection with the question as to whether it was a practical thing to do, and on the point of the con-
39718 fusion, what was said?

A. I don't recall.

Q. Well, whom, in addition to Mr. Wilkerson and Mr. Conklin, did these discussions occur with?

A. I couldn't tell you. If it had not been for this specific instance having been brought up, then I would probably not have recalled them.

Q. You just have a vague recollection that other discussions took place, but you cannot tell the time, the place, or the party?

A. You are right.

Q. You do know that those parties were representatives from other cement manufacturing concern in the East?

A. There might have been some individual or field man who had heard about it, a territory salesman, or it might have been some executive of the company.

Q. Of the cement manufacturing companies?

A. Yes.

Q. Who, of course, are selling cement just as you are down there; is that correct?

A. Well, not selling exactly like we are, but they are both in the cement manufacturing game; yes.

Q. That is, competing with you?

A. That is right.

Q. Now, Mr. Werle, in referring to Commis-
39719 mission's Exhibit 202, mentioned the names of Butler Company in Savannah, some dealer in Atlanta, and one other dealer's name, and asked you if you sold them, and you told him you did not recall.

A. I do not recall ever having sold them.

Q. Is it your testimony that you have not solicited business from those concerns?

A. Unless Allen at Summerville, I don't think our salesman called.

Q. You are not sure of that?

A. I am not sure about some of them.

Q. Can you cite us any instances between the date of the time when you began to use the so-called control clause and July 2, 1937, where you submitted a bid to the Federal Government, and where land-grant rates were involved, and where you did not use the control clause?

A. No; I would have to refer to our records.

Q. It was your practice over that entire period to use it, was it not?

A. Yes; unless a situation came up where we found a preponderance of f. o. b. mill bids being submitted, and if that was the situation, we attempted to meet it by likewise quoting.

Q. Can you cite any instance where you went contrary to your practice and submitted to the United States Government an f. o. b. mill bid without reference to the control clause or destination clause?

39720 A. I cannot do it unless I refer to our records.

Q. You know, do you not, Mr. Dannelly, that during the time that you used that control clause, and for some time subsequent to your use of it, you secured land-grant information from The Cement Institute; that is, your company secured it?

A. We had secured it for a while following the abandonment of the N. R.

Q. And you sent land-grant rate information to The Cement Institute, did you not?

A. I would think perhaps we did, although I could not say.

Q. And the land-grant information secured from The Cement Institute you used in connection with submitting bids to the Federal Government?

A. Some of it, yes.

Q. When was it that you bid to the State of Alabama this one cent low on 34,000 barrels?

A. It must have been around 1932, it seems to me, Mr. MacIntyre.

Q. You cannot recall of an instance of that character since then, can you?

A. No, sir; not on that amount of cement.

Q. Now, you spoke about this contract being overwritten.

A. Yes.

Q. Was not that in connection with this statement that your salesman made involving The Cement Insti-
39721 tute, and which resulted—

A. No.

Q. —from correspondence between you and The Cement Institute?

A. No; it was not. I personally negotiated this deal with the contractor to take the balance on the contract on account of a new job. I went to Columbia, S. C., to see the contractor, and I consummated the deal with him, myself.

Q. Just when did that take place

A. I would have to refer to the record to find out.

Q. Well, can you give us the approximate time?

A. Oh, it was prior to 1933.

Q. During the so-called depression period, 1930 to 1932, then; is that correct?

A. Yes, I remember distinctly the depression better than I do the year.

Q. Can you cite us any instance where published prices of your competitors to the dealer trade in any particular town have been different from the prices you published the dealers in the same town?

A. Yes, sir. I can furnish a lot of them. Any time a price change takes place, where prices are reduced, our old quotations are in the same town at the same time that our competitors get out their new quotations.

Q. Well, within a short period of time, the time
39722 between which it takes one quotation to get there and another, after they all arrive, they are all the same, are they not?

A. No. I don't know whether tomorrow our Montgomery, Ala., quotation is higher or lower. If it is, the chances are that one of our dealers will find it out and get in touch with our salesmen.

Q. How often did the price quotation in Montgomery, Ala., change during the period from June, 1935, to July 2, 1937?

39723 A. I cannot keep in my head the price changes at various towns and at various times.

By Mr. MacIntyre:

Q. Well, you have found that at Birmingham, Ala., the price has been the equivalent of the basing-point price at Birmingham, plus the rail freight; have you not?

A. No; the prices in central Alabama have been made by Phoenixville, Birmingham, North Birmingham—Leeds can get on fairly well—and Spocari.

Q. And it is a basing point price at those locations, plus the freight to points in central Alabama?

A. Well, these are the principal points to which we can check prices as relating back to a constant figure.

Q. How frequently from July, 1935, to July 2, 1937, did those basing prices at those locations which you have just now talked about change?

39724 A. I cannot carry those details in my head. There may have been one. There may have been five. I don't attempt to carry them.

By Mr. MacIntyre:

Q. On direct examination you gave some testimony that you had been told by certain contractors that they had some special prices lower than published prices—lower than your published prices?

A. Yes, sir.

Q. What part of your business is involved in sales to contractors?

A. Possibly 33½ to 50 percent.

Q. And what part of that 33-1/3 percent have you been able to—or have you sold to contractors at less than your published prices to dealers?

A. Not a very large amount.

Q. Well, when you say "not a very large amount"—

A. Well, what do you want it in, barrels, percentage?

Q. Percentage.

A. Number of contractors?

Q. Percentage.

A. Well, of course, over a period of time it would vary, but certainly our business, that type of business, would not run over five percent of a year's business.

Q. In other words, you cut your price less than
39725 on business amounting to less than five percent
of your total; is that correct?

A. That would be correct. That does not mean, however, Mr. MacIntyre, that in some instances where we have met a price that immediately as we met it why a price would be established as of that date. For instance, we may have gone ahead, and, for instance, at a point at $2.50 delivered price. We may have wind that they have a secret price of $2.40, which had been quoted for that point. It is entirely possible that we took the business at $2.40 when by chance the price immediately became $2.40 on the day that it was closed. That is a possibility.

Q. When you say it became $2.40, you are talking about the published prices now, aren't you?

A. That is right.

Q. And not so-called cut prices?

A. That is right.

Q. So the so-called cut price was in effect less than five percent of your total business?

A. That is correct.

Q. When you say that you make sales to your employees, that is giving them a special price, do you mean that you are selling them at the Birmingham plus, and then giving them a slight discount?

A. No, sir. We have a price of $1.75 to the em-
39726 ployees of our company at Ragland, Ala.

Q. That is equivalent to the Birmingham base, isn't it, Mr. Dannelly?

A. No, sir; I do not believe so, Mr. MacIntyre.

Q. What relationship does it have to the Birmingham price?

A. It has none whatsoever.

Q. Well, as to the level, is it higher or lower?

A. It would be lower.

Q. The Birmingham base is how much?

A. Leeds is—

Mr. Werle: As of what date? May we have the time, please?

Mr. MacIntyre: Take it as of July 1, 1937.

A. Why, I cannot remember a base of that time. I can refer to our records. You asked me what it is today, and I thought that is what we were talking about. I think perhaps I could tell you.

By Mr. MacIntyre:

Q. Well, how much less than Birmingham plus freight to Ragland is your price to your employees in comparable package?

A. I do not know the freight from Birmingham to Ragland. I know that—

Q. You have stated the freight on—

A. I stated the freight from Ragland to Birming-
39727 ham. Whether that same freight rate can apply, we can assume that, and discuss it from that point.

Q. You have stated a rate on Respondents' Exhibit 3012 from Birmingham to Ragland as being 38 cents per barrel.

A. No. From Ragland to Birmingham is 38 cents a barrel.

Q. Well, it would be approximately the same, wouldn't it?

A. Well, I am not a freight traffic man. If you want to assume that to be correct, then we can compare the two prices.

39728 Q. Well, now, with that understanding, Mr. Dannelly, what is the relationship of the price that you quote your employees at Ragland and the Birmingham base?

A. There is no relationship.

Q. What is the difference between the two?

A. The difference in price?

Q. Yes.

A. Laid down at Ragland?

Q. Yes.

A. All right.

39729 Trial Examiner Norwood: Now, answer that, if you can.

A. When I left Birmingham last week, to the best of my recollection the freight from the base at Birmingham, at North Birmingham, was $2.10. To that, if you add your freight or what we assume to be correct, 38 cents, would be $2.48 per barrel, cloth sacks, Ragland. Our price to our employees, a special price, is $1.75 in paper.

By Mr. MacIntyre:

Q. What would it be in cloth?

A. Oh, well, they won't ever take it in cloth.

Q. You have given us the Birmingham price in cloth; what would it be?

A. All right, $2.48 less 25c and is $2.23 in paper, I would say, as against $1.75, which we charge our employees.

Mr. Werle: Now, if Your Honor please, I would like to move to strike the witness' answer to this series
39730 of questions because this is talking about last week, and, as I understand it, we are limited to July 2, 1937.

Mr. MacIntyre: It so happens that on direct examination we could not get the time fixed when Mr. Werle went into that price question, and I am willing to take any time he was talking about on direct examination.

Trial Examiner Norwood: Well, as I understand it, you wanted to illustrate something here to determine the relation between his local price and his price based on freight.

Mr. MacIntyre: That is correct.

Trial Examiner Norwood: Now, if he can recall any earlier times, I think that he might illustrate it there.

Mr. Werle: Well, if Your Honor please, the only difficulty with that is that we are speculating about things in connection with the witness' recollection. We have tried to prove these precise facts with exhibits here, and they have been refused, and I object to this speculation as to what the price may have been and what some relationship is between a base in his price, when he said there was not any.

Trial Examiner Norwood: I think that I will allow that motion and permit the witness to take those books and refresh his memory, if you want to bring out these actual prices.

39731 Do you want to open that up?

Mr. MacIntyre: Well, I did not consider, if Your Honor please, that I had opened it up. I was merely attempting to follow through what they had developed on direct examination as to the relationship between the price to his employees and his commercial trade. They went into it. I am attempting to find out what his answer meant.

Trial Examiner Norwood: Well, bring out what his practice was prior to July 2, 1937. I do not want to open this inquiry up any further about recent practices.

Mr. MacIntyre: I would be glad to take any answer the witness can give us as to that period of time.

Trial Examiner Norwood: Go ahead.

Mr. Werle: The witness has twice answered there is no relationship between the base at Birmingham and his price to his employees at Ragland.

Mr. MacIntyre: Well, as to any relationship or difference, I do not care so long as I know what the facts are.

Trial Examiner Norwood: Well, go ahead.

Mr. MacIntyre: Your Honor wants to strike what was put in the record, we will be glad to get his answer back in any other period that he can give us, and I am waiting for his answer if he can give it to us.

39732 Mr. Werle: I do not think there is any question.

The Witness: Is there a question pending?

Trial Examiner Norwood: I think so.

Mr. Werle: May we hear it, please.

Trial Examiner Norwood: Now, testimony about those recent prices have been struck. You can ask him directly if he can give you any prices prior to July 2, 1937, that will throw light on the situation.

Mr. MacIntyre: Well, I will give up on the line. We have attempted to have that and could not get that, and we attempted to have it the other way, so I will give it up and go on to something else.

Mr. Werle: Now, wait a minute.

Trial Examiner Norwood: He says he does not know.

Mr. Werle: Exactly.

Mr. MacIntyre: Well, I move to strike his testimony on direct to the effect that he did quote different prices to his employees than his commercial trade.

Trial Examiner Norwood: I will take that under consideration.

By Mr. MacIntyre:

Q. Mr. Dannelly, you stated that you had no base at your Ragland mill, and that if you did make one or put in one there it would not make a marked difference in delivered price quotations in that particular area. Do you recall that testimony?

39733 A. I think I was reading from Clark and Burns testimony there, or Burns and Clark, but I think those facts would be substantially correct, in the area that we serve, not the area immediately surrounding the plant.

Q. What did you mean by the words "marked difference"?

A. Any appreciable difference.

Q. Marked difference?

A. Any appreciable difference in delivered prices.

Q. What do you mean by the word "appreciable"?

A. Well, all right. We can make them lower or higher,

that is what I testified this morning, and if we made them lower, or if we made them higher, why, the other mills probably would not meet it, we would be high. We would not get any business. We certainly do not want to lower the price. We want to get as much as we can for cement.

Now, my idea in bringing out that it would not make any marked difference was that immediately surrounding our plant we did not have enough population to consider giving them any special benefit of the location of our plant. We are not located in the city. We are located in a rural community. There is not a good sized town within 30 miles of Ragland.

Q. If you put in a base price there equal to the base price at Ragland, wouldn't all of your delivered price quotations east of your mill from there to the Coast be lower than they are today, by a substantial amount?

39734 A. That would depend on when the shipment was made. We had Clinchfield, it has been a base point, and been out. We have had port prices been in and been out.

Q. At any time when Clinchfield was not a base?

A. And no port prices there?

Q. Yes.

A. Well, yes, probably would.

Q. It would make them substantially lower, wouldn't it?

A. Oh, no, no. No, sir. Leeds at times is a base, that is taken into consideration in calculating prices, and I do not believe that we have more than perhaps a two cents advantage over Leeds going east.

Q. That is assuming that you would have the same base price as Leeds?

A. Assuming, yes.

Q. If you made your base price lower than Leeds you would have that much lower advantage?

A. Oh, we could make it 50 cents lower.

Q. Now, referring to Respondents' Exhibit 3012, and to the red colored area which you have described as your freight advantage territory, Will you name the towns that are on the edge of the outline of that freight advantage territory?

39735 A. What do you mean on the edge? Outside, or the edge inside,—what?

Q. Right in the edge to which the red territory goes.

A. I would not like to testify what towns near the edge. I can tell you what towns this includes; I can tell you the towns that are in close proximity, but how close I could not say from this map,—this area here.

Well, go ahead.

Q. You had to determine what towns you were figuring on, you were figuring the freight rate to, in order to find out whether or not you had a freight advantage, didn't you, Mr. Danplly?

A. That is very true.

Q. I am just asking for the name of the town.

A. All right, Pell City.

Q. What direction is that north, east, south, or west; just point that out and follow around on that red circle and tell us the name of the towns to which those freight rates were figured.

A. All right. Asheville, Pell City, Lincoln, Riverside, and I do not think we hit Gadsden, we may include Gadsden. I am not sure from this, but we do not go any further east with any freight advantage out of Anniston, Ala.

Q. Does that complete your circle?

A. Yes, sir.

Q. Now, on direct examination you told Mr.
39736 Werle that you do ship into Memphis, but you do not ship into Chattanooga, as shown.

A. We have shipped into Chattanooga. We do not solicit any business there at all.

Q. I believe you told him the reason you did not was because it was unsatisfactory net?

A. No. I believe if I did that was wrong.

Q. Well, what is your reason for not soliciting in Chattanooga?

A. We cannot get any business.

Q. Is that true of all the towns in southeastern Tennessee?

A. Well, we cannot get enough out of that to pay our salesmen traveling. We had one up there and had to take him out.

Q. Is that true of all other towns just across the Tennessee line between Chattanooga and Memphis?

A. That may not be true, but you have to work your territories, Mr. MacIntyre, on fringes more or less by the economical transportation of your salesmen by highways. There is a highway running right across in here that a man,

if he goes up in there, has to go out of his way. I am getting the direction of the highway wrong. But there is not any towns close enough along in here to get any business out of to pay for gasoline to go up there and get it.

Mr. Werle: Just a minute, please. When you pointed in here, then, I think the record should show you pointed just north of the Tennessee line.

39737 The Witness: That is right.

By Mr. MacIntyre:

Q. How far east is Jackson, Tenn., of Memphis?

A. Jackson, Tenn., to my recollection, is more or less northeast, I would say, about 70 miles.

Q. On the main highway, isn't it?

A. Yes, sir.

Q. And your salesman does not go out and solicit business even though he does solicit in Memphis?

A. That is correct.

Q. Jackson is a good sized community, isn't it?

A. Yes, sir; it is.

Q. And that is true of other towns on the same highway, just out of Memphis?

A. Yes; but you cannot work your salesmen out like a fan, out and back, out and back; geographical locations of towns have something to do with the economical operation. We could work Jackson, Tenn. We could send them up there and we would not get any business.

Q. Do you work salesmen in Asheville, N. C.?

A. Yes, sir.

Q. Waynesville, N. C.?

A. Yes, sir.

Q. Murphy, N. C.?

A. I do not know whether he goes to Murphy, or not.

39738 Q. But he does not go into Johnson City, Tenn.?

A. No, he does not go into Johnson City.

Q. He does not go into Morristown?

A. No.

Q. Nor Knoxville?

A. No.

Q. Yet you travel them as far east in North Carolina as Raleigh?

A. That is correct.

Q. And you travel them as far west and southwest of your plant as Jackson and Hattiesburg, Miss.?

A. That is correct.

Q. And your freight rates to those points are considerably more than they are to Chattanooga?

A. That is correct.

Q. And your mill nets would be considerably less in shipments to those points than they would be to Chattanooga?

A. Well, now, I would have to figure that out.

39739 Trial Examiner Norwood: I do not think we need to discuss that at length. It is very clear to me that Counsel have the right to ask for further explanations of the map. He has given a map there which purports to give boundaries beyond which his prices are not the controlling prices, and I think he can bring out anything with respect to that.

Mr. Werle: I quite agree, Your Honor, but I do not think there need to be any mystery. If they are going to make some contention, we have an agreement not to

39740 go into Tennessee across that State line, I think we ought to be entitled to know about it if they are going to make that contention. That was the only point of my question.

I think Mr. MacIntyre can answer that question without reading six pages of the record to me.

Trial Examiner Norwood: Well, go ahead.

Mr. MacIntyre: Well, I consider the map immaterial and objected to it on that ground.

Trial Examiner Norwood: Go ahead.

What is your explanation about not getting any of the business in Chattanooga or Knoxville?

The Witness: Judge, there is no use sending a salesman around unless he can get enough business to at least pay his expenses and salary.

Trial Examiner Norwood: Why does he not get enough business up there?

The Witness: Well, you have a lot of local pressure there. You have a lot of local stockholders.

Trial Examiner Norwood: You have local mills.

The Witness: That is where the influence comes from, and you have specific local brands of cement.

Trial Examiner Norwood: It is like carrying coals to Newcastle.

Go ahead.

By Mr. MacIntyre:

39741 Q. On that point, Mr. Dunnavant, you do sell in New Orleans?

A. No, sir.

Q. You do in Atlanta?

A. Yes, sir.

Q. Do you solicit business in New Orleans?

A. No, sir. We at one time did. We have not solicited there for several years.

Q. Greenville, Miss.?

A. That is right.

Q. And Monroe, La.?

A. That is right.

Q. And you have sold and shipped cement to those points in recent times—in recent years?

Mr. Werle: To which points are you referring?

Mr. MacIntyre: Monroe, La., and Greenville, Miss.

A. Those two towns; yes.

By Mr. MacIntyre:

Q. Now, you referred in your testimony this morning and yesterday afternoon to meeting the price changes in Mississippi, where changes in freight rates had increased delivered price quotations; do you recall?

A. Yes, sir.

Q. You do describe that as an instance where you raise your prices to meet competition; is that correct?

39742 A. That was an instance where we increased our prices to meet increases; yes.

By Mr. MacIntyre:

Q. That is, you increased your prices to meet the prices quoted by your competitors, and you considered in doing so you were meeting competition?

A. We considered in doing so that we were going to not to have to pay the difference in freight.

Q. I would like an answer to the question.

Trial Examiner Norwood: Is that meeting it or not?

The Witness: I think that is the meeting of competition, whether it is meeting that competitor's price.

39743 By Mr. MacIntyre:

Q. On your direct examination you stated that Mr. Stutz, prior to the time that you subscribed to The Cement Institute freight rate books, handled traffic matter altogether. You meant that you handled it, and in that

connection prepared compilations of freight rates from not only your mill, but also basing points to the various destinations at which you solicited business; is that correct?

A. That was one of his duties, yes.

By Mr. MacIntyre:

Q. Now, in what manner did your company use for traffic or shipping purposes the rates that he thus compiled, from basing points to destination?

A. I see no use we make of them in the transportation of our cement.

Q. That is, your shipments or traffic; is that correct?

A. That is correct; yes.

Q. You did use them in connection with pricing, though, did you not?

39744 A. We did in trying—it was a method by which we tried to ascertain any change in basing rates.

Q. And you used similar information that the Cement Institute furnishes you in its freight rate books for the same purpose?

A. Yes.

By Mr. MacIntyre:

Q. That is, in calculating price work?

A. Well, now, not only price work, but in figuring our mill net, checking back the shipment to find out the mill return.

Q. That is in connection with the pricing, though, it is not shipping?

A. These are the rates out of there for our own shipments, also.

Q. Those are the rail rates that are shown from Kegland?

A. That is correct.

Q. Do you use the Kegland rate for pricing?

A. I cannot say that we do.

Q. So it is the only rate that you use for ship-
39745 ping, and it is the only rate that you do not use for pricing, that appears in the freight rate books?

A. That is correct.

By Mr. MacIntyre:

Q. Calling your attention to Respondents' Exhibit 3042-X, will you tell us what is referred to in the use of the form "base point sheets"?

A. At one time we sent our salesmen from time to time a list of points that we considered were points that influenced prices at specific times.

Q. And why did you send lists of basing-point prices to your salesmen?

A. Well, for several things and ideas that we had in mind. One of them was to keep them advised of any changes in the marketing of cement in other territories, as well as their own.

Q. Is it your testimony that although you supplied your salesmen with freight rate information from basing points to various destinations in their territory, and also with basing-point price lists, that you did not expect them to use them or use that information in any way?

A. I have not made such a statement. I do not
39746 believe I have testified to that.

Q. Well, for what purpose did you expect them to use such information?

A. They could use that to estimate prices, but we never let a salesman quote a price when he was working for our company.

Q. He could calculate your delivered prices, though, through that method?

A. It was possible to do so.

Q. And you furnished him the tools with which he could do so?

A. For a while we did; yes.

Q. Why is it necessary, Mr. Dannelly, for either you or any one of your salesmen to know anything at all about basing-point prices?

A. Well, it is not. We could struggle along and sell our cement without knowing anything about a basing point. We couldn't do it as efficiently, and probably could not sell as much cement, and we might not be able to sell so much, but we could sell cement, and plenty of it, if we did not know anything about basing-point prices.

Q. When you say you could not do it as efficiently—

A. I should not have made that remark. I will change it. We could sell our cement if there was not such a thing as a base price.

Q. Did you not mean when you said "not as effi-
39747 ciently," that you could not match the prices of your competitors at all destinations as easily as you do now?

A. No, sir; no, sir. I meant by that—I started to mean, without as much confusion among the salesmen, as to changing their vernacular, as to our basing points.

Q. To drop all your work on basing points, would throw your salesmen into some confusion, would it not?

A. Yes; any change in your practice would cause some confusion.

Q. I believe on direct examination you testified to the method of such figuring and compilation prompted you to anticipate the price of your competitors at various destinations. That is correct, is it not?

A. We use those methods in anticipating them.

Q. You said that the reason you opposed the diversion trend was because all you wanted was to collect the delivered price at the point to which the shipment is diverted.

A. No, sir.

Q. Now, a diverted shipment that is destined from one point to still another point, does not change your mill net that you expect to get on that shipment; does it?

A. I did not testify, Mr. MacIntyre, that we wanted to collect the freight at the point to which it was diverted. I said we wanted to collect the amount on our invoice that the buyer contracted to pay when he bought that car of cement.

Q. Does that mean that you want to maintain
39748 your delivered price quoted at the point to which it was first destined?

A. It means that we want to collect the amount of money that the man contracted for when he ordered the car of cement to be delivered to that point.

Q. That is true irrespective of the fact that the cement is confined to him, and he pays the freight to the railroad company, whether he diverts it or not.

A. Well, if he diverts it to another point, we intend to invoice it to the point to which he diverts it.

By Mr. MacIntyre:

Q. Invoice it to the point, less the freight?

A. Invoice him at the delivered price in the town to which he is diverting it.

Q. Less the freight?

A. No, not less the freight now.

Q. Well, your practice, up to the time of the issuance of the complaint in this case, was to invoice him at the delivered price, less the freight?

A. Less the freight back to our plant.

Q. I still ask you, Mr. Dannelly, on diverted shipments in transit, your mill net, that is, the return after he paid the freight to the railroad, was the same whether
39749 the car was diverted or not?

A. It is possible on some shipments for it to be the same; yes, or I would say it is the same.

Q. Well, it is, is it not?

A. The freight rate to a specific point does not change, whether he diverts the car of cement, or whether he uses it at that point.

Q. I am talking about the expected mill net, I am not talking about the freight now. It is the same whether he diverts it or not; is that correct?

A. I believe it would be.

Trial Examiner Norwood: If he diverts it a shorter distance than the original destination, he would not have to pay the railroad the freight for the longer distance, would you?

The Witness: Yes; but he made his question as if he was going to ship a car of cement, and if we make the sale of it we get our original mill net whether he ships it off somewhere else by diversion or not. If he connives with the railroad to take the car somewhere else, he pays us on the basis of the price established at destination.

Trial Examiner Norwood: Then, if he had the car stopped at a shorter distance and made a special rate there, who would get that?

39750 The Witness: We would invoice him at the place he stopped the car.

Trial Examiner Norwood: In other words, he would get the difference, then, in the larger freight?

The Witness: I don't know. We would want our money for the price where he stopped the car.

By Mr. MacIntyre:

Q. It would not make any difference in your mill net, would it?

A. I don't know, sir. I never figured it back to find out.

Q. The mill net fixes the terms of sale; you could not get any more whether it is diverted or any less; could you?

A. I don't understand what you mean by the question that the mill net fixes the terms of sale.

Q. When you invoice a shipment to a man at a fixed destination—

A. Yes, sir.

Q. —you, of course, set up the amount in the invoice that you expect him to pay you after he has paid the freight to the railroad. That has been your practice up to the time of the complaint in this case?

39751 A. There was on the face of our invoice the net amount that we would receive if he paid the freight on the car of cement.

Q. And whether he diverted that car in transit or not he still paid you the same amount, and you received as much as you expected; is that correct?

A. Yes. If we did not do anything about it, he did.

Q. So the diversion did not make any difference in the amount of money you received from him?

A. Not on that particular—

Q. On the diverted shipment.

A. Yes.

Q. That is what I tried to get 15 minutes ago.

A. I am as anxious to get through as you are.

Q. On direct examination, you spoke about Mr. Fred Wiggins, and referred to him as a representative of the Atlas Company, at Birmingham.

A. Yes, sir.

Q. You meant the Universal-Atlas Cement Company.

A. Yes; correct.

39752 Q. And you stated you secured from him a copy of this document entitled "Method of Marketing Cement," which is shown by Commission's Exhibit 547-4-D to 4-I; as shown to you by Mr. Werle. Do you recall that?

A. Yes; I recall that.

Q. What did Mr. Wiggins say to you on that occasion?

A. You know, it is awful difficult to think back that far and remember the part of a conversation. I don't know what the man said. He had it sticking out of his pocket. He says, "Have you seen one of these?" I looked at it, and it looked as if there might be something new in it, and in the business where I was making my living. Whether he got it out or who got it out, I didn't question him. I merely wanted to see it. I asked him if he had an extra copy to let me have. That is as far as I can go in that conversation.

Q. He gave you an extra copy?

A. He sent one over, yes.

Q. Can you fix the date?

A. No, sir; not except possibly May or June, 1935, I believe it was.

Q. You do not think it could have been May 1, 1935?

A. Well, if it is May 1 or May 30 or June 30, now, I don't know.

Q. You do not know whether it was May 1st, or not?

A. No, sir.

39753 Q. Can you tell us on what date that you announced to the trade that you would no longer sell the Federal Government direct cement that it expected to use on emergency relief projects?

A. I don't quite get that. I would have to refer to a figure or a document, if we sent one out.

Q. Referring to Respondents' Exhibit 3039-A and B, is that your first announcement to the effect that you would no longer sell the Government direct cement for use on emergency relief projects (handing the exhibit to the witness)?

A. I believe this is the first statement that we made relative to the sale of cement to those agencies.

Q. You had previously sold the Federal Government cement for use on emergency relief projects direct, had you not?

A. If we did, we did it against the wishes of our dealers.

Q. I asked you, as a statement of fact, whether you had or not?

A. I couldn't tell whether it was a clarification of our immediate practices, or whether it was something new—certainly no radical change in our policy.

Q. There has been put into the record here a document that you issued, an announcement of your stated policy, as of February 23, 1935. Will you tell us whether or not that provided for direct sales in that type of business?

A. No, sir; I do not believe it said anything 39754 about that to emergency relief agencies.

Q. It says all Government business would be direct, without specifying that there would be any exclusions, such as emergency relief?

A. That is my recollection.

Q. Do you have a copy of it?

A. No, sir; I have not.

Mr. MacIntyre: Do you have a copy, Mr. Werle?

Mr. Werle: No, I have not.

The Witness: But I feel reasonably sure it made no reference to it.

By Mr. MacIntyre:

Q. That is, it made no reference to a policy of selling business through dealers?

A. I believe it did not make any reference to anything at all except it said U. S. Government. I don't know that it said anything about emergency agencies. I don't know whether it mentioned them direct or not.

Mr. MacIntyre: I would like to ask the Respondents to produce the printed circular announcement of his company on that date.

Mr. Werle: My recollection is that we looked into that, and there was not any copy of it in the company's file. I developed through Mr. Dannelly the fact—I think he testified to it—he found some other company had put
39755 out an announcement, and that his company fairly well copied that.

Is that correct, Mr. Dannelly?

The Witness: That is right.

Mr. Werle: And that has reference, I believe, to the Lehigh announcement, particularly, of February 19, 1935; so I think the state of the record is that the policy in February was substantially in accordance with the policy issued by the Lehigh Company in February, 1935.

Mr. MacIntyre: In all of its essentials.

The Witness: Yes.

Mr. Werle: I think that is so.

The Witness: Yes; that is right.

By Mr. MacIntyre:

Q. When you received this document entitled "Method of Marketing Cement," from Mr. Wiggins, that you have just been talking about, what did you do with it?

A. Read it, studied it; it had something new. There were no new polices outlined in it, but it was interesting as everything new is interesting.

Q. And then did you file it away?

A. No; we made a copy on my yellow sheet in my office, of portions of it.

Q. Did you send it to your salesmen?

A. I don't remember whether we ever sent it to
39756 the salesmen or not. I know we showed it to them from time to time.

Q. Did you discuss it with them?

A. Yes.

Q. Now, referring to this Knoxville meeting of The Cement Institute, Southeastern Division, Sixth District, July 17, 1935, about which you testified on direct, who at that meeting stated that they planned to do something and you could take it or leave it?

39757 A. Now, there didn't anybody say that at the meeting. They said that in an argument after the meeting had been adjourned. The argument started after the meeting adjourned.

By Mr. MacIntyre:

Q. But at the time and place of the meeting?

A. No, not at the time and place of the meeting. The argument started on the same day.

Q. Well, in the same room as the meeting was breaking up?

A. Yes.

Q. I believe you testified?

A. Yes.

Q. And many of the people who attended the meeting had not left?

A. Some of them had not left.

Q. And that that statement was made in a discussion of the group who had remained?

A. That is correct.

39758 Q. And who said that, made the statement?

A. I do not know. I cannot recall who made the statement.

39762 Washington, D. C.,
Wednesday, May 29, 1940.

39763 J. M. DANNELLY, JR., thereupon resumed the stand and testified further as follows:

Cross-Examination (Resumed) by Mr. MacIntyre.

39765 Q. Isn't it a fact, Mr. Dannelly, that your present pricing methods permit you to ship from your mill in Ragland, Ala., to Raleigh, N. C.?

A. We do ship to Raleigh, N. C., from Ragland.

Q. Is that one of the reasons for having your mill located where it is?

A. I had nothing to do with the location of the
39766 plant, Mr. MacIntyre. I was employed after the plant was built. It is my duty to try to sell the cement.

Q. You replied in response to my question, Mr. Dannelly, that under the present method of pricing you are permitted to and do sell and ship into Raleigh, N. C. I will ask you this further question: Isn't your mill dis-
39767 advantageously located for sales and shipments into distant points, such as Raleigh, N. C., except under the present pricing method used by you and the industry?

39768 Trial Examiner Norwood: The objection is sustained.

Now, I excluded the testimony here on the Commission's objection as to whether or not these plants were disadvantageously located, and on the ground that there is no issue as to the location of any particular mill; that that was merely alleged in the complaint as one of the results of trade restraint, the kind of trade restraint which you have alleged and you are trying to establish.

Now, I consider that that is not a factual issue in this case, and you are asking questions that go to that.

Mr. MacIntyre: If Your Honor please, I recall that the Respondents, through this witness and through many other witnesses who have preceded him as defense witnesses, have put into issue over our objection through these maps, if you please, the question as to whether or not that given this set of maps they could survive if this method is taken away from them of selling. I recall the big maps of the Witness Hogan, and of his testimony, and the Witness Affleck, and all the others, and here is another map of
39769 the same character which would be used, of course, for argument, and for economic testimony on the same point, and I am only attempting now to find out what this witness' reaction is to those facts.

Trial Examiner Norwood: Now, you may bring out my factual matter about it or any explanation of a map there. You may ask him what the various boundaries mean, and what the price was within and without, and the trade conditions, and so forth, but make it factual.

The objection is sustained.

By Mr. MacIntyre:

Q. Mr. Dannelly, do you consider that this map shows

anything concerning the advantage in location of your mill with respect to other mills or markets?

A. It simply shows the location of our plant.

Q. I am asking you if you consider it shows anything concerning advantages or disadvantages with respect to that location and sales territories into which you solicit and ship?

A. I do not think it does.

Q. You do not think it could be used for an argument that it is advantageously located or disadvantageously located; is that correct?

39770 A. Advantages for what?

Q. Well, you can make the explanation.

A. It shows the location of our plant in reference to the other plants. It shows that Birmingham is to the west, Lima is to the east. Of course, there is no plant in Lima, Rockmart. It simply shows the location of our plant in the area in which we normally solicit business.

Trial Examiner Norwood: Does it indicate the
39771 advantages or lack of advantages with respect to sales and shipments?

The Witness: In the immediate surrounding territory it would show that we had some advantage.

Trial Examiner Norwood: In that red?

The Witness: Yes, sir.

Trial Examiner Norwood: In that red spot there in Northern Alabama, that is a zone or a territory of freight advantage?

The Witness: It is an area purported to show that, yes.

By Mr. MacIntyre:

Q. Why is it that you are permitted to and do ship cement to Raleigh, N. C., whereas your freight advantage territory is limited to that small red area?

A. We ship cement to Raleigh, N. C., because the lowest delivered price at Raleigh, N. C., of one of one of our competitors is such that this company is willing to accept business there.

Q. In other words, you get a satisfactory mill net to you on your shipments to Raleigh, N. C.?

A. That seems to be satisfactory business at the present time.

Q. Considerably less, though, than any mill net you receive on shipments made within that red area; is that correct?

39772 A. That is correct.

Q. Some of your competitors from as far away as Tennessee sell cement to dealers and consumers within that red area, though, do they not?

A. Very little. They probably sell some.

Q. And some of your competitors with mills in Birmingham sell considerable quantities in that area?

A. No, Mr. MacIntyre: There is not very much consuming market in that area, but they sell some cement in that area.

Q. Well, a substantial portion of the quantity that is consumed in that area, do they?

A. Are you still speaking of the red area?

Q. Yes.

A. I do not know. I could not answer that question. They sell some cement there, and we sell some. What proportion of that tonnage that either of us get, I don't know.

Q. Isn't it a fact that your present pricing methods permit and contribute to your sales and shipments into Raleigh, N. C., and your competitors, and sales and shipments into that red area?

A. May I answer that one at a time?

Trial Examiner Norwood: Yes.

A. I can't tell why. Well, let us take Raleigh, N. C. We can ship into Raleigh, N. C., because the present existing price seems to be a satisfactory one that we get.

39773 The why and wherefor of how that price that we meet there is established is not necessary for us to take into consideration when we decide to take business there.

Q. When you say that you ship into Raleigh, N. C., because the price that you receive is satisfactory, do you mean the mill net that you receive in that instance?

A. The mill return that we get, yes.

Q. That is what you meant, when you have referred to the satisfactory price that you have received from all these other points?

A. That is what I mean in that particular instance; yes, sir.

Q. Now, you have testified in your stipulated testimony, page 39537, paragraphs 20 to 21, concerning reasons why you do not care to load trucks at your mill. Isn't one of the reasons that you do not care to ship cement by truck to

all people who would care to send their trucks to your mill for it on an f.o.b. mill price to them is the effect such would have on delivered prices or delivered price quotations that you make for rail delivery?

A. We never considered that, Mr. MacIntyre, as our major—as a possible major—as a most important problem that might develop out of that.

Q. Well, whether you consider it as the most important problem or not, what considerations have you given
39774 to it as a problem?

A. Trucking from the mill as a problem?

Q. No. The effect of that on delivered quotations for rail delivery?

A. Why, I don't know, the matter that we find in the field is something that we give consideration to naturally in respect to a mill return. If our competitors quote—if they quote delivered prices, we meet the quotation. If abruptly it were to change, we would have to adjust ourselves to the change, but we play no part—that plays no part in our unwillingness to permit trucking from our plant.

Q. I am asking you what effect you have considered that deliveries to trucks at your plant on an f.o.b. mill basis would have on these delivered price quotations for rail delivery?

A. I do not thing we have ever considered that point at all. We have got a very much more important problem to us, that has always occupied our minds when anything of that sort presented itself.

Q. Is it your testimony you have never written, or any officials of your company, have never written anyone in which that problem was discussed?

A. No, sir; not that I recall. I do not know what other officials did, but I do not think I recall writing anybody about trucking from the plant that would interfere
39775 with our delivered price method of marketing our cement.

Q. Or having made any statement as to the effect on those delivered prices?

A. I do not recall if I did.

Q. You do not recall what consideration you have given to it?

A. Yes, sir; I do. I know we were faced,—in our location there,—faced with a much more important problem than that.

Q. I am talking about that problem, however. You do not know what consideration you have given to that problem—that is, the effect on delivered prices?

A. I do not recall that we have ever taken them into consideration for any particular length of time, anyway.

Q. Have you given any consideration to the problem as to what deliveries to truck on an f.o.b. mill price would have on dealer prices?

A. We think more in terms of the effect on distribution than we do on prices.

Q. You have given consideration to trucking from that angle?

A. Yes.

Mr. Werle: May I make sure that that question is understood.

The Witness: Yes. May I have it?

Mr. Werle: May we have that last question read, please?

39776 Trial Examiner Norwood: Read the question.

(Question and answer read.)

Mr. Werle: From what angle?

The Witness: From what angle?

By Mr. MacIntyre:

Q. The angle of its effect on trucking.

Trial Examiner Norwood: I think this witness can state if he does not understand the question.

The Witness: May I start back to follow the line of it there, please, the last question?

(Record read.)

Mr. Werle: Now, distribution of prices; the witness has two angles.

Trial Examiner Norwood: I think it is perfectly clear and the witness evidently understood it.

Go ahead.

By Mr. MacIntyre:

Q. What do you mean by the word "distribution"?

A. I mean as to the protection of our dealer customers in their home towns, confining sales to them in their home towns.

Trial Examiner Norwood: Well, what kind of protection is that?

The Witness: I do not know whether I should have used the word "protection," Judge. It is a policy that

protects our company from the dealers getting sore,
39777 not coming back, and refusing.

Trial Examiner Norwood: By reason of cut prices?

The Witness: No, sir. By reason of trucking, as I thought we were considering there; by reason of trucking, permitting trucking to dealers who might come to our plant and take the cement, and instead of hauling it to their own towns, that they would drop it off at some other town.

By Mr. MacIntyre:

Q. And sell it at a lower price than the dealer is selling cement in that town?

A. Well, the dealer would not welcome him there if he sold at all.

Q. Isn't it your experience that sales have been made at prices lower than the dealers in those towns?

A. There have only been rumors. I have never known it to be.

Q. It has come to you in the due course of your business that that has been the case, hasn't it?

A. I do not know. They said it was sold in that town. I do not know what the price may have been, whether lower, or just the mere fact that they are selling cement in their town is not a welcome situation by a dealer.

Q. Isn't it your testimony that some of the information that has come to you in the due course of your busi-
39778 ness is to the effect that such cut prices had occurred?

A. I could not say whether it has or has not. It is possible that it has.

Q. You have no recollection on it?

A. Neither way.

Q. Trucking of cement by dealers in their trucks from your plant which has been purchased on an f.o.b. mill price facilitates diversion in transit, doesn't it?

A. Well, the only experience we had with trucking, as I described—

Trial Examiner Norwood: Can't you answer his question?

The Witness: I beg pardon.

Trial Examiner Norwood: Answer his question directly.

The Witness: All right. Let me have the question.

Trial Examiner Norwood: Read the question.

(Question read.)

A. Permit the man who trucks the cement to haul it wherever he wants it, yes.

By Mr. MacIntyre:

Q. He can haul it into high-priced areas or low-priced areas as he desires?

A. He can haul it anywhere he wants.

Q. Now, the problems of distribution involving
39779 that of diversion which you have considered in connection with trucking from your plant, have contributed to your decision to discontinue trucking of cement, hasn't it?

A. The instance that caused us to discontinue the small amount of trucking that we were doing at our plant—

39781 Q. You have given consideration to the problems, including that of distribution, in connection with your discontinuance of trucking, haven't you, Mr. Dannelly?

A. Yes.

Q. And in connection with that problem of distribution, you considered the question of diversions?

A. It was because of diversion. It was because of the delivery of some cement by one dealer in another dealer's town that made us stop trucking.

Q. And with all of the effects of doing that, as you have described on your direct examination?

A. It interfered with the business of the dealer in whose town it was sold.

Q. In the manner that you have already described here?

A. When it was bought by this dealer from the other town.

Q. Now, you recall Respondents' Exhibit 3036-A to D, that exchange of correspondence you had with the Carolina Institute at Raleigh—I mean at Charlotte.

A. At Charlotte, yes.

Q. And you stated when you discussed as to whether or not this dealer in Lenore, N. C., should be sold as a dealer, that you discussed it with your individual dealers up in that territory; do you recall?—

A. I believe it was Liberty, S. C. We had our salesmen to go, after we received this communication, we
39782 had been selling A. L. Johnson previous to this; we had our salesman check into the matter. He went over to see that A. L. Johnson again, checked on him to see if he was in the building material business, which he continued so to do, and naturally he talked with the other

dealers around there, not as to Mr. Johnson's qualifications, but in reference to the Carolina Building Material Dealers' Institute protesting the sale to Mr. Johnson.

Q. And some of these dealers to whom you talked, or your salesman talked in that vicinity, were members of the Carolina Institute; is that correct?

A. I think some of them are.

Q. Now, referring to Respondents' Exhibit 3041, that bill of lading that carries that diversion stamp of yours, and also referring to Commission's Exhibit 584-G, the circular letter of Mr. Browder's that carries the diversion stamp information on your Exhibit 3041, you do not see anything in that stamp that claims that the cement shipped is the property of the shipper; do you?

Mr. Werle: I object to that. The stamp speaks for itself.

Trial Examiner Norwood: Did he say that it was the property of the shipper?

Mr. MacIntyre: He has testified that it is similar to the stamp appearing in Commission's Exhibit 584.

39783 Mr. Werle: Both stamps are in evidence. They can be compared.

Mr. MacIntyre: I am trying to find out what he meant by the word "similar."

Trial Examiner Norwood: The objection is overruled.

A. I do not know, I do not recall testifying that they were similar. We testified that we had been using a stamp similar to the one that is in evidence here since 1930, the same stamp, we said we were using the same stamp since 1930, whether I compared that as being similar to another stamp, but it served our purpose as far as diversion went.

By Mr. MacIntyre:

Q. In other words, 1930 to 1935, you used the so-called non-diversion stamp that appears on Respondents' Exhibit 3041?

A. From 1930 to 1940 we have used it.

Q. Is it your testimony that you haven't used the stamp that Mr. Browder suggested in Commission Exhibit 584-G?

A. I do not think we have ever changed the stamp; we used the same one right through.

Q. When you say you do not think, is it your testimony you haven't used the stamp Mr. Browder suggested?

A. To my definite knowledge we have not used any stamp

but the stamp we used here, from 1930 to 1940 at the present time.

39786 Q. Now, Mr. Dannelly, referring to your stipulated testimony beginning, in line 8, page 39534, in which you referred to Commission's Exhibit 547-4-D to 4-I, in that you stated that section 1, entitled "United States Government Work," you had sold in the manner described in both columns of paragraph A, for five years prior to July, 1935.

Now, do you mean to testify that you had sold
39787 emergency relief—that is, cement for use on federal emergency relief projects through dealers for five years previous to July, 1935?

A. It had been our policy to sell work of that type if such work existed—I do not recall whether federal
39788 emergency and unemployment relief went back through the entire five years.

Q. Is it your testimony that you sold the cement that the Government purchased for use on emergency relief projects through dealers?

A. I say it was our policy, Mr. MacIntyre. We may have made exceptions to our policy.

Q. When did it become your policy?

A. Oh, I cannot point to any specific date when it became our policy—when those—

Q. Isn't it a fact that it became your policy to do that on May 2, 1935, as is shown by your announcement, Respondents' Exhibit 3039-A and B?

A. It was our announcement at that time, but it might have been our policy prior to that time. We published this announcement.

Q. How long prior?

A. I do not know.

Q. Was it a month?

A. I could not tell you; when such conditions arose, why, we attempted to follow that policy.

Q. Well, can you approximate the period of time over which it was your policy?

A. Why, we will say approximately from the time when these agencies might have been created and went into existence.

Q. Now, is it your policy, Mr. Dannelly, that you,
39789 from the time the emergency relief agencies were created, that you sold all cement that was used by

them on the project that they carried on through the dealer instead of selling direct to the Government?

A. No, sir. We sold as much as we could—we permitted the dealer to sell as much as he could. We might have met competition in some instances to sell it direct.

Q. That makes *your testimony* rather indefinite. Can't you tell us in what percent of instances you did the one and in what percent you did the other?

A. No, sir; I cannot. It was largely our policy to work with the dealers on that type of business.

Q. Now, in line 15 of your stipulated testimony, page 39534, you say that in some parts of your territory your competitors began to sell this work direct, and in such parts of that territory your company met the competition. When did that occur?

A. I could not tell you.

Q. Was it subsequent to July 2, 1937?

A. Possibly so, yes.

Mr. MacIntyre: On the basis of that testimony, if Your Honor please, I move that that portion of the stipulated testimony in paragraph 8 be stricken.

Trial Examiner Norwood: You do not remember any particulars regarding this matter, do you?

39790 The Witness: Judge, I cannot, on the specific date when we started doing such and such a thing, I could go back to our records and find out when the first sale or the second sale might have taken place. These things arise in the normal course of doing business. They do not particularly impress you sufficiently to have a specific date or sale in mind.

Trial Examiner Norwood: You cannot give it approximately, or can you give any names or any dates?

The Witness: I would not like to; no, sir; because I do not know whether they would be anywhere near correct, or anything.

Mr. MacIntyre: I move to strike paragraph 8 of the stipulated testimony appearing on page 39534.

Mr. Werle: Of course, we oppose any such motion because the charge is that there has been a continuation of certain practices until the present time, as I understand it. Considerable Government evidence has been introduced on the theory that it shows a continuation. I do not—evidence, therefore, indicating that there was no continuation of a practice is highly relevant and material.

Trial Examiner Norwood: I think the motion should be allowed to this.

Go ahead.

39791 Mr. Werle: Well, as to what page and lines now?

Trial Examiner Norwood: Paragraph 8 of this stipulation here.

Mr. Werle: But not the entire paragraph.

Mr. MacIntyre: That runs from line 8 to line 21, inclusive, on page 39534.

Mr. Werle: Then, if Your Honor please, the motion is out of order because, as I understand the witness' testimony with respect to whether of not it occurred subsequent to the complaint, he was talking about this 1, 2, 3, 4, 5, the sixth line in paragraph 8, to the end of that sentence, and even as to that—

Trial Examiner Norwood: Maybe I am looking at the wrong paragraph. Give me the record. I was thinking of paragraph 8.

Mr. Werle: Now, this is the sentence that they were referring to (handing papers to the Trial Examiner), as I understand it, and even as to that sentence the witness says well, possibly. But there isn't anything on the record here to show that that began after the complaint. There is no proof of that.

Mr. MacIntyre: I disagree with Mr. Werle. There is plenty of evidence in the record put in over our objection, put in by other defense witnesses to the effect that they started selling that subsequent to the beginning

39792 of 1938, and this witness cannot remember when that took place, but some other witnesses have remembered.

Mr. Werle: That hasn't anything to do with this National Cement Company, though. This witness is not bound by their testimony.

Trial Examiner Norwood: Go ahead.

Mr. Werle: Well, has the motion been allowed?

Trial Examiner Norwood: The motion has been allowed, yes.

Mr. Werle: As to the entire paragraph 8?

Trial Examiner Norwood: Yes.

39793 *Redirect Examination by Mr. Werle.*

Q. Mr. Dannelly, with respect to the paragraph 8 in this stipulation of your testimony, which appears at page 39534 of the record, will you tell me now in the light of your statement there with respect to paragraph 1, subsection (a), of Commission's Exhibit 547-4-D, referring to purchases by Government agencies except unemployment relief, will you tell us whether or not you sold that kind of work in the manner described in the second column prior to the time of this complaint?

A. Prior to the time of this complaint?

Q. The complaint in this case; that is, July 2, 1937.

Trial Examiner Norwood: July, 1937.

A. Oh, yes, we have sold it.

By Mr. Werle:

Q. And is it or is it not correct that you have sold that kind of work in that fashion for at least five years prior to that time?

A. That has been our policy to do so with the privilege of meeting any exceptions we may find in competition.

Q. Now, with respect to paragraph (b) of section
39794 1, referring to purchases by federal emergency or unemployment relief agencies, did you sell that kind of work in the manner described there prior to July of 1937?

A. We solicited the business and tried to get it through a dealer.

Q. Prior to July, 1937?

A. Yes.

Q. Now, your testimony shows that at some time after you had that policy of selling that through the dealer that you have changed it in some respects to meet competition.

A. That is very true; we have.

Q. And as to that, can you tell us whether or not that change occurred prior or subsequent to July to 1937?

A. Why, it took place subsequent to that.

Q. It did?

A. Yes.

Q. I see.

39795 Q. Mr. Dannelly, did you ever receive any instructions from Mr. Nicholson that the Code Au-

thority for the Cement Industry prevented your company from quoting or filing f. o. b. mill prices?

A. No, sir.

39797 Q. I think that answers the question.

Now, Mr. MacIntyre asked you about the land-grant service of The Cement Institute. Will you tell us how your company determined whether or not to use the land-grant rates shown in the Institute service, or some other land-grant rates? How did you determine which to use?

A. Our traffic manager was instructed to use the lowest.

39798 Q. Now, Mr. MacIntyre asked you a number of questions about why you do not sell in certain places over the State line in Tennessee, and I want to ask you whether or not you could tell us as to each of the places he mentioned. I think he mentioned Jackson, Tenn. Will you tell us just what the reason is that you do not solicit business in Jackson, Tenn.? That is correct—at Jackson, Tenn., or Jackson, Miss.?

A. Well, there is one in each State. He was talking about Jackson, Tenn.

We have no particular reason for not working Jackson, Tenn. We had a man in the State of Tennessee; we had a man who worked out from Nashville for two years and traveled practically the entire State. We could not sell cement; we could not sell enough to sustain this man. We took him out. We had a man who made eastern Tennessee. We had very good business until there until the Volunteer plant was built, but we had to take him out. We solicited Memphis merely because our salesman on his itinerary, in working Mississippi, found it frequently neces-

39799 sary for him to make a loop around in Mississippi, and we have some friends there on whom he calls, and we get some business—a very small amount of business—out of Memphis.

Q. I think on cross-examination Mr. MacIntyre asked you something about anticipating prices of your competitors. As to that, will you tell me what that is based on; how do you anticipate prices?

A. I thought I was testifying in reference to the increase in the public quotation of our competitors on the freight rate increase in Mississippi.

Q. I see.

Now, in cases where you have anticipated, will you tell me whether or not the results always justified your anticipations?

A. No, I don't think so.

Q. How long do you expect competitors' prices are going to remain as they are?

A. We don't know.

Q. Do you have any expectation as to that at all?

A. No, sir.

39802 *Recross-Examination by Mr. MacIntire.*

39805 Q. Now, will you tell us; Mr. Dannelly, on what date you began to sell through dealers cement purchased by the Federal Government for use on emergency relief projects?

A. We began to solicit that business when these agencies appeared. We tried to solicit that, and we do, through dealers.

Q. I am asking you when you started to sell anything through dealers? Mr. Dannelly.

A. I cannot tell you. I can't point to any definite date.

Q. Can you give us the year within which you started to sell such business through dealers, as distinguished from soliciting through dealers?

A. Well, we naturally sold a certain amount of it through dealers when we started soliciting it, but when those agencies appeared, it was something new, it was a new type of purchaser. The dealers claimed or felt that they had a claim on that type of business, that they could service it, and we tried to help them get the business when those agencies appeared.

Q. When did you start selling such business through dealers?

A. We started selling such business through dealers when the agencies started buying cement.

39806 Trial Examiner Norwood: You do not know when that was?

The Witness: When did the agencies start buying cement?

Trial Examiner Norwood: Answer the question. Do not ask me.

The Witness: I beg your pardon. I am sorry, Judge.

Trial Examiner Norwood: When did the agencies start?

The Witness: I don't know when the federal agencies started.

Mr. Werle: The record does show that, however, Your Honor.

By Mr. MacIntyre:

Q. Can you tell me what percentage, or approximately what percentage, of the total business you sold for use on such projects you sold through the dealers, prior to May, 1935?

A. No, sir; it would be more or less of a guess. I would say we sold possibly 75 percent of it through a dealer.

Q. It was not necessary for you to meet your competition in that respect, such as the Lehigh Company, in selling that work direct up until April 7, 1935, then, was it?

39807 A. Mr. MacIntyre, to explain my position, I don't want to be argumentative now; I just want to keep us all straight—to explain my position, when these agencies started buying cement, we started soliciting business through dealers. We naturally sold some of it; we did not sell all of the cement that they bought. The Lehigh Company, or somebody else, may have sold some of it. It was our policy to solicit and to sell that business through the dealer in so far as competition permitted us to do so.

By Mr. MacIntyre:

Q. And your testimony is that competition permitted you to sell 75 percent of such sales as you made through the dealer; is that correct?

A. From 50 to 75, yes.

Q. And so you did not have to meet competition where they sold theirs through the dealer in that respect?

A. I don't know whether they sold all theirs through a dealer or not.

Mr. MacIntyre: That is all.

Mr. Werle: That is all.

Trial Examiner Norwood: In regard to this paragraph 8 in the stipulation, as it stands in the record, it was stricken, but there is further information on it at different places in the record, and I will consider reversing that at some future time, after I study the record;

39808 possibly at the next hearing. But as it stands in the record, it is struck, and that will prevent any forfeiture by reason of the absence of this witness.

Mr. Werle: So long as it is confined to paragraph 8, and to nothing else in the stipulation, I have no objection to that.

Trial Examiner Norwood: Yes. That is a rather interesting point, and I would like to study it.

Mr. Werle: Is the witness discharged?

Trial Examiner Norwood: The witness is discharged.

39809 FRANK PEARSON, called as a witness for the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Werle.

I am associated with the Cumberland Portland Cement Company, at Cowan, Tennessee, and am secretary and treasurer. Cowan, Tennessee, is on the Nashville, Chattanooga and St. Louis Railroad, in middle Tennessee, be-
39810 tween Nashville and Chattanooga. I have been secretary-treasurer of Cumberland since July 1929. I am also a director of the company, and have been a director since its organization May, 1926. I am familiar with the sales policies and price policies of Cumberland, and I am consulted in connection with the policies and practices of the company as they develop.

Prior to May, 1926, I was not associated with any cement manufacturing company. I had been in the lumber business, with the Davidson, Hicks & Greene Company, who were hardwood lumber manufacturers. My employment began with them in 1912, and I was continuously with them in the lumber manufacturing business and coal mining business until that same company organized, promoted and built the Cumberland Portland Cement Company on part of their Cowan, Tennessee property.
39811 I am familiar with the circumstances surrounding the organization of Cumberland, and am familiar with the circumstances surrounding the selection of that site for the cement mill. The officers and directors of the lumber company, of whom I speak, realized that the stand of timber on the property which they owned in
39812 Franklin County was nearing its end—(continuing).

In order to perpetuate employment for their employees and utilize part of the property which it owned in Cowan, the board of directors of the lumber company—and I was a director—passed a resolution and authorized an expenditure of $5,000 to investigate the property for its ce-

ment or lime possibilities, and Dr. James O. Handy, Pittsburgh Testing Laboratory, was employed to carry out this investigation. His report was very favorable as to the possibilities of producing cement from the property. The officers and directors of the Lumber Company decided whether or not Davidson, Hicks & Greene Company
39813 would enter into the manufacture of cement. None of the officers or directors of the Lumber Company had had cement experience of any kind. A survey had been made of the properties. The Cumberland plant is now located right on the same site that the lumber company was. Immediately adjacent to the plant, we have all the principal raw materials.

39814 Q. Now, Commission's Exhibit 3132, Mr. Pearson, is an answer to the questionnaire that the Cumberland Company submitted to the Federal Trade Commission in 1931. It refers to the plant capacity of the Cumberland Company as of May, 1932, as 840,000
39815 barrels. Will you tell me whether or not the original capacity of the company has changed since the plant was constructed?

A. There have been improvements made in the kiln process, and I would estimate an increase of six or eight percent above that point. We can now produce 900,000 barrels.

Our present daily rate will average, with both kilns in operation, from 2550 to 2600 barrels per day; so in the operation of 340 or 350 days, it would normally produce 900,000 barrels. We have never exceeded 65% of possible capacity during the period of Cumberland's operation. We usually have certain shutdown periods, during 2 or 3 of the winter months. I am familiar with the manner in which Mr. Monday became interested in Cumber-
39818 land. The original promoters, who retained a majority of the stock of Cumberland, ran into financial difficulties in their businesses, which they had to liquidate. Their holdings, which was a majority of stock of Cumberland, were placed on the market at a considerably sacrificed price—much less than they had paid. Mr. Monday, with other interests, acquired the controlling stock from the former owners or promoters or originators of the
39819 company, in March, 1929. Mr. Alexander is a director of Cumberland. Mr. Alexander participates

very little in the operations of Cumberland. To explain, if I may, Mr. Alexander's reason for being a director of the company was that he was executive vice president of the American National Bank at Nashville, to which Cumberland owed a second mortgage of a considerable amount. As I recall, it was $365,000, and at the request of the officers of the bank, to agree to continue that loan to the new control, Mr. Alexander, along with Mr. James W. Miller, of the same bank, was placed on the direc-
39820 torate. The only time I see Mr. Alexander is at the annual meeting of the stockholders and directors, when he comes to Cowan. I was assistant general manager of Cumberland when it began to do business.

Q. The record, I believe, shows, or will show, that your company sells the large part of its cement at delivered prices. I would like you to tell us, if you can, how
39821 the Cumberland Company came to begin selling cement in that fashion?

A. When the Cumberland Company was organized, and those who were promoting it being inexperienced in the business, they employed an experienced sales manager and a general manager, who had had previous experience. The direction of sales was left in their hands, and they developed marketing policies, which were used at that time, and they have been continued.

Q. Did your directors or the officers give any consideration to starting out to sell cement in some different way from the way you observed that it was being sold?

A. No, sir.

Q. Did the officers or directors, to your knowledge, at that time, receive any assistance from any other cement manufacturing companies with respect to finding a sales manager, or anything like that?

A. They did not.

Q. Did your company begin to sell in the manner that it began sales, as the result of any collusive arrangement or any understanding with any other cement companies?

A. No, sir.

39822 Q. Well, let me ask you this question, then, Mr. Pearson: During this period that your company was formulating its marketing of cement, were there any conferences or meetings of any kind with other cement manufacturers, on the part of your officers or directors?

A. No, sir.

Q. At one time is it correct to say that you were handling cement in your capacity as sales manager of the company?

A. I did for a few months during 1932.

Q. And during the period that you were directly conducting the sales, did you make any changes in your practices or policies of the company with respect to price?

A. No, sir; I continued the policies that were already in effect.

Q. Was there any understanding—any meetings that you had with other competitors, or any understanding with respect to your doing that?

A. None whatever.

Q. Does the Cumberland Company have any arrangement whereby it obtains information concerning basing points, or so-called base prices, from competitor companies?

A. No, sir.

39823 Q. Do you have any course of business whereby you obtain such information from competitors?

A. No, sir.

Q. Do you have a traffic manager for the Cumberland Company?

A. Our billing and shipping clerk handles all traffic matters.

The witness identified Resp. Ex. 3058 as a map that was prepared at his direction in his office, on which is outlined, the outer red line, the pencil line, defining the territory in which Cumberland travels and engages in normally soliciting business. The small, somewhat kidney shaped, red outline in the center is a circle which surrounds Cumberland's mill, within which it has a freight advantage over any competitor. The information concerning the freight rates was worked out by its rate traffic clerk.

39824 The witness doubts whether the rate traffic clerk checked those rates with the official tariffs. The rate traffic clerk took them from the Institute rate books.

Examination on Voir Dire by Mr. Wooden.

Resp. Ex. 3058 was made up last fall or early in this year. The witness does not recall the exact month. At the time that Cumberland started its plant it never made

up a similar showing in the ordinary course of its business.

Mr. Woodea: Your Honor, the exhibit is objected to on the same grounds that similar maps have been objected to in the past, as being speculative and as not meeting any issue that is raised by this case. This
39825 case is concerned wholly with the question of an alleged combination, and the mere fact, if it be a fact, or attempted claim, that if they are not permitted to continue the combination, we will be getting a result that is entirely irrevelant and immaterial, and I object to it.

39826 (RESP. EX. 3058, was offered and received in evidence.)

Direct Examination (Continued) by Mr. Wegle.

Q. Mr. Pearson, will you look at Respondents' Exhibit 3058, and tell me whether or not you can vouch for the accuracy of the area which purports to outline the territory in which you have a freight advantage?

A. In so far as the scale of the map is concerned, I am sure the lines are rather accurately drawn.

Q. And this little red circle around Cowan, Tenn., does show the area in which your company has a freight advantage over any other cement manufacturing company?

A. That is right.

Q. With respect to the area outlined as your sales, your normal sales soliciting territory, can you tell me how your company determines in what areas it will solicit business?

A. Well, we give two considerations there; one where a satisfactory customer would promote a sale of our product, and where the return to us is satisfactory for a profitable business.

Q. Does the Cumberland Company have any arrange-
39827 ment with any other companies with respect to the areas in which it will solicit business?

A. None whatever.

The witness identified Resp. Ex. 3059 as a list showing the cement plants which regularly sell cement in the territory in which Cumberland sells.

(RESP. EX. 3059 was offered and received in evidence.)

By Mr. Werle:

Q. You mentioned a moment ago, Mr. Pearson, in determining the area in which you will solicit business, one of the factors you consider is whether or not business in that area might be profitable. Are you in charge
39828 of the operating end of the Cumberland Company?

A. Yes, sir.

Q. Will you tell me whether you can tell from your mill net on a given sale at a given time whether or not that sale represents a profit?

A. That individual sale? That cannot always be determined.

Q. Does the Cumberland Company have any minimum mill net below which it will not sell cement?

A. No.

Q. How do you determine how low you will go on net on a particular business?

A. We would give consideration to the volume of business that we have booked, and what our volume of shipments might be at the time this below net business would be offered to us, or that we might be required to ship.

39829 Q. I think you said a moment ago, Mr. Pearson, that at this present time you have a shipping clerk who acts as a traffic man; is that correct?

A. That is right.

Q. Was there a time when your company had a separate traffic man?

A. This man, this same man, was traffic manager at one time, when our Nashville sales office was in existence.

Q. Now, in connection with the use of The Cement Institute freight books, prior to the time that you had those Institute books did you subscribe to any similar compilation—any service that gave you freight rates?

A. No, sir; we compiled our own freight rate information from railroad tariffs.

Q. And was that one of the duties of your traffic man at that time?

A. The traffic man at that time was known as
39830 the traffic manager, and he had two assistants.

Q. Now, can you tell me whether or not The Cement Institute rate books represented any saving to your company, in dollars and cents?

A. Yes, sir.

Q. Have you made any estimate, or have you compiled any figures with respect to that saving, Mr. Pearson?

A. Yes. After the freight rate books were available to us, we abandoned all our traffic department. The only think we use now, and since those books have been available, is what might be called a shipping clerk, who handles all freight rate information, the invoices and the billing. We do not try to maintain any railroad tariffs any longer.

Q. Can you tell me what your estimate has been as to the amount of saving to the company by reason of having the Institute rate books?

39831 Q. You may answer, Mr. Pearson.

A. Yes; I have made an estimate some time ago.

Q. Will you tell me what that estimate was, and how you determined it?

A. Well, I took the cost of the traffic department that we at one time had, which included the traffic manager and an assistant and a lady stenographer, all of whom were replaced by this one bill clerk in our plant office. The amount of the saving I have estimated to be between $3,600 and $3,800.

Q. Is that per year?

A. Per year.

Trial Examiner Norwood: How much do you pay for the Institute books?

The Witness: I cannot answer that question exactly.

Trial Examiner Norwood: Well, did you use that figure in making your estimate as to the savings?

The Witness: Yes, sir. At that time that estimate was the total cost of all services rendered to us by The Cement Institute was less than $50 a month, but that included things in addition to the freight rate service.

By Mr. Werle:

39832 Q. Does the Cumberland Company use freight rate books for invoicing?

A. Yes, sir.

Q. That is, for showing the freight on the invoice?

A. And for billing purposes.

Q. And for bill of lading also?

A. And for shipping purposes.

The witness identified Resp. Ex. 3060 A to L as actual contracts of Cumberland executed on the dates shown

during the period from 1929 through December, 1935. There were no changes he could recall in Cumberland's contracts during the period from December, 1935 until July, 1937 except those represented between those different forms. These represent the terms and conditions of sale on which Cumberland was doing business at the times indicated.

39837 (RESP. EX. 3060-A to 3060-L, was offered and received in evidence.)

Direct Examination (Resumed) by Mr. Werle.

Q. Mr. Pearson, with respect to the Cumberland Company following along, do you know whether or not your quotation forms have been actually copied word for word, or provision for provision, from some competitor's form?

A. They would not be copied word for word, but the terms and conditions that are in those contract forms I am sure follow closely similar forms that were
39838 found in the field from our competitors.

39839 Q. Mr. Pearson coming to another matter, does the Cumberland Company have any policy with respect to limiting—not limiting, but as to where it will sell a dealer, confined to his particular town or something of that kind?

A. We would not sell a dealer in one town at another destination in competition with another of our dealers.

Q. What is your reason for having that practice?

A. We would lose the good will of the dealer in whose territory we permitted shipments to a competitive dealer.

Q. Has that practice or policy been brought about through any negotiations with or any agreement
39840 with any dealer associations?

A. Certainly not.

Q. Or through any negotiations or understanding or agreement with any other cement manufacturers?

A. No, sir. That policy is considered good business for ourselves.

Q. Have you had that policy ever since your company has been in business?

A. Yes, sir.

Q. Now, did the Cumberland Company at one time permit buyers to take delivery of cement at the mill in trucks?

A. Yes, sir.

Q. And do you recall how you came to begin that practice?

A. Well, it just grew up, one or two customers called for cement in trucks for their convenience. We permitted them to start.

Q. Can you tell me whether during the period that you permitted that, whether a large or a small proportion of your shipments were called for in that way?

A. A rather small proportion.

Trial Examiner Norwood: Did you sell to those trucks f. o. b. mill?

The Witness: No, sir. We sold them f. o. b. destination and figured the freight rate from the mill to that destination

39841 By Mr. Werle:

Q. Well, by that, when you say you figured the freight rate, do you mean you allowed them the freight from the mill to the destination?

A. That is right, if they trucked it, themselves.

Q. And were they invoiced—how were they invoiced? Were they invoiced at a mill price?

A. They were invoiced at destination price.

Q. Less the freight?

A. Less the freight if they hauled it.

The witness identified Resp. Ex. 3961 as an announcement which he wrote dated August 10, 1932 addressed to Cumberland dealers, announcing the discontinuance of delivery of Cumberland products by trucks, effective August 15, 1932.

39842 (RESP. EX. 3961, was offered and received in evidence.)

By Mr. Werle:

Q. Since the time of that announcement, Mr. Pearson, have you discontinued all trucking wholly, or have there been occasions when you have made such deliveries?

A. We make occasional deliveries by truck, and have made since that announcement.

Trial Examiner Norwood: Well, was that on the same terms as before?

The Witness: Yes, sir.

Q. Now, Mr. Pearson, let me call your attention

39843 to Commission's Exhibit 976-12-N, your answer to the Burns and Clark questionnaire, which indicates the discontinuance of trucking as of September, 1933.

Can you tell me whether or not—which of those dates is correct, September, 1933, or August, 1932?

A. This letter, which has just been admitted, was written by me, and I also compiled the answer to the questionnaire to Clark and Burns. The only way I can describe that discrepancy in date, the letter of announcement is the actual date. The questionnaire was answered from memory, and I seem to have failed in recalling the proper date.

Q. Now, will you tell us briefly what were the circumstances which caused you to send this announcement, which is Respondents' Exhibit 3061?

A. As I stated in an earlier question, when we first began trucking, it was just one or two nearby individuals wanted less than a carload of cement, and we sold it to them not realizing what it might lead to as the demand for that trucking privilege increased, and did increase, we found that we were greatly handicapped at our packing house because of the introduction of trucks for which we were not equipped to load with our regular railroad loading operations. We ran into other difficulties. I recall customers at one point who would be billed at destination might drop off the cement at a nearby point where we had a good dealer who was receiving rail shipments, and did not care to truck. He would make sale of 39844 of the cement which he had bought from us, with the intention, we supposed, of it going to the destination at which we had billed it, sold it in the nearby area, and disrupted the retail market of our dealer, therefore our friendly dealers raised complaint about it. We were glad to get rid of trucking.

Q. Did you ever, during the period that you were doing this trucking you have mentioned, have any extra charge of 15 cents or any other amount for truck delivery?

A. We never did.

Q. Now, in connection with your present statement as to the reason for your discontinuing trucking, I would like to call your attention to your answer to the Burns and Clark questionnaire, Commission's Exhibit 976-12-N again, question 10-C, 3-I, and ask you to explain what you mean by that answer there with respect to inability to determine transportation costs?

A. Under the method of pricing which we had always used, we recognized freight rates only. We had access

to either published railway tariffs which were public information, or to Cement Institute rate books, which we later used, and there were no such published tariffs in our area at that time for trucking. The prices that we made to trucks loaded at our plant, as I have said, were destination prices with the rail rate worked out in there. It was found that some fly-by-night truckers would make delivery of that cement at less than the rail rate and use
39845 that advantage in disturbing the retail market in some particular area.

Q. Did you have any meetings with your competitors with respect to discontinuing trucking?

A. No, sir.

Q. Did you have any arrangement with them of any kind or character with respect to your trucking or not trucking at any time?

A. We never did.

Q. Can you tell me who in your company made the decision to stop trucking?

A. It was largely my decision, perhaps in consultation with the sales manager.

39850 The stipulated testimony of the witness Frank Pearson is as follows:

1. Since its organization, the Cumberland Portland Cement Company has sold the greater part of its cement production at delivered prices but there has been no period during the operation of the company when all of its cement was being sold at delivered prices. The reasons for this are that: With few minor exceptions customers of the Cumberland Company have always requested destination prices; with no exceptions, all customers of the company purchase cement on the basis of the laid down cost at destination; and in order to compete with the many other manufacturers selling in the same area, the Cumberland Company must meet competitive prices at destination.

2. It has been the observation and experience of the witness that even in the few cases where an individual cus-
39851 tomer, such as some department of the United States Government, has requested quotations f. o. b. mill, the determination as to which brand of cement will be purchased has always been made on the basis of the comparative laid down costs of various cements at destination. In other words, all buyers of cement buy at delivered prices and that is why Cumberland quotes delivered prices.

3. The Cumberland Portland Cement Company has never had any agreement, understanding, or arrangement of any kind or character with any other Respondent as to its prices, the nature of its prices, or the method of determining its prices except, of course, to the extent that the Cumberland Portland Cement Company was required by law under the N. R. A. Code of Fair Competition for the Portland Cement Industry to observe its filed prices.

4. Since it began to operate, the Cumberland Portland Cement Company has been a price follower, that is, it meets price conditions as it finds them in the markets in which it sells, and either meets the lowest prices it finds in the market or does not attempt to sell in that market. Precise information as to competitors' prices at the destinations where the Cumberland Company sells is obtained from dealers and other customers of the Cumberland Company. Salesmen of the Cumberland Company are constantly traveling throughout the areas in which it sells, soliciting orders and making sales, and they are under orders to, and do keep the home office advised of the
29852 lowest prices being quoted to dealers and others by competitor companies in those areas. In addition to that, the Cumberland Company has found that many of its dealer customers advise Cumberland directly by telephone, telegraph, or letter of any changes in the prices being quoted to them by competitor companies.

5. Bids submitted by competitors on federal, State and other governmental lettings are, of course, publicly announced and the Cumberland Company learns of the prices bid by competitors as soon as bids are opened, either through a company representative attending the opening or from the official tabulation furnished by the Government department, or from reports on the bids published by various periodicals and private reporting services.

6. Thus, the Cumberland Company is currently and continuously aware of the prices being quoted by competitors in all of the markets where the company sells. Therefore, in determining what price the Cumberland Company will quote at a given destination, the first thing it does is to check in the manner described the last known lowest price quoted at that point by some competitor company. For ready reference the Cumberland Company keeps a card index record of the lowest prices discovered from

time to time and refers to that record for the purpose of quoting prices unless and until it is advised in one of the ways mentioned that there has been some change 39853 in the prices. Cumberland has used this procedure since 1927 when the company began business but previous to 1932 lists of delivered prices were used instead of the card index record.

7. When Cumberland was organized it found that competitors made a practice of issuing printed price quotations to the trade. Certain competitors issued their quotations periodically and others only on the occasion of some change in prices. In order to bring the Cumberland Company to the attention of the trade and win the approval of potential customers Cumberland likewise adopted the practice of issuing printed price quotations at times of changes in its prices.

8. The Cumberland Company not only meets the lowest openly quoted prices which it finds at destination, but attempts to meet deviations from those openly quoted prices when it has reason to believe lower prices are being offered by a competitor. From time to time competitors offer their cement for sale at prices lower than their openly quoted prices. In order for the Cumberland Company to obtain business when that occurs, it has been necessary for it to quote prices lower than those shown on its printed quotations openly announced to the trade. At times, in an effort to meet such competitive conditions, the witness is satisfied that the Cumberland Company has sold cement at prices lower than the lowest prices offered by other competitors.

39854 9. The majority of the special prices or deviations from published prices which Cumberland has discovered have been made on contractor business and for that reason the deviations by Cumberland from its published prices are also generally confined to contractor business.

10. When Cumberland is advised by its salesmen or customers that a competitor has advanced its prices at a particular destination, the company's practice is immediately to check with its salesmen and customers at all the principal destinations in its sales area to find out whether or not the advance in price by the competitor is general or whether it is confined merely to a particular destination or a particular area. Cumberland may or may not meet

the advance, depending upon what it finds that other competitors do within the immediately succeeding days. Having discovered that the advances in prices do affect a particular area, Cumberland attempts to discover the nature of the price change. In order to do that, it deducts from the delivered prices, so found, the freight rates applicable from the various mills shipping to each destination in order to determine whether or not the new prices reflect some constant figure at a given mill. If Cumberland finds that a constant figure is reflected, it then assumes, on the basis of what has happened in the past, that the other prices quoted by the given company in that area which have not yet come to its attention will be
39855 made on the same basis as the prices found. Accordingly, if Cumberland should have occasion to quote at such points it would anticipate that condition in an attempt to be competitive.

11. If Cumberland is advised by its customers and salesmen that the price of a competitor at a given point has been reduced, it immediately meets the reduction, but at the same time checks again throughout the area to find out what is the extent and nature of the reduction in order that it may attempt to anticipate the lowest prices a competitor will quote at other points.

12. This attempt to anticipate the lowest prices which might be quoted by others is not done through or by reason of any understanding, agreement, or arrangement with any other Respondent. It is based simply on past experience coupled with a desire to attempt to meet competitive conditions in all Cumberland's markets as rapidly and speedily as possible so that the company will have an opportunity at least as favorable as any other competitor of obtaining business from its alert customer trade at any point where it sells. The Cumberland Company is dealing with hundreds of customers at hundreds of destinations and almost all of such customers are dealing with or being solicited by from one to ten or fifteen competitors. Speed and alterness on Cumberland's part to meet any and all competitive conditions, even if it is necessary to
39856 guess at or anticipate them, is an absolute essential to stay in the market and keep its customers.

13. It has been the experience of the witness, when Cumberland has advanced its prices, that it takes from three to four months before Cumberland's business

begins to reflect the advances in price and that it takes from five to six months before the sales it makes fully reflect the advanced prices. The reason for this is that all outstanding contracts on Cumberland's books at the time of the advance are, in accordance with the terms of its contracts, shipped to completion at the former price, and in addition to that, it will cover orders by customers at the old price for 15 days from the effective date of the new higher price. This enables customers to load up on cement at the lower prices and little or no business is available at the new prices until the customers have disposed of the cement which they already have on hand.

14. I have examined Federal Trade Commission, Exhibit 557, which is the Code of Fair Competition for the Portland Cement Industry, approved by the President of the United States on November 27, 1933. Article XI in that exhibit expresses the practices which the Cumberland Company was following, for the most part, for several years prior to that date. Those practices developed over a period of years in a gradual way, and, as competitors changed their practices and policies, either by giving more favorable terms or conditions to customers generally 39857 or by bringing about conditions which placed the Cumberland Company at some disadvantage in connection with the sale or marketing of its product, Cumberland had to meet those conditions or forego the business. After Article XI of the Cement Code was suspended, the Cumberland Company continued to follow the practices which it had been following under Article XI, except in so far as competitor companies varied from such practices to the extent that it was necessary for Cumberland, in order to maintain its customers and its business, to vary accordingly.

15. The Cumberland Portland Cement Company has not had and does not have any agreement, understanding, or arrangement with any Respondent with respect to following or not following Article XI or its provisions after that article had been suspended, or with respect to selling certain customers or work direct or to dealers.

16. Cumberland considers the dealer to be the backbone of its business. It represents constant, day in and day out repeat business year after year. The importance of the dealer has had tremendous influence on Cumberland's marketing methods and policies. The company is con-

fronted with the constant necessity for obtaining new dealer outlets, fostering dealer good will and quoting its dealers at prices and on terms that will enable them to compete with other dealers selling in the same consuming area.

17. The Cumberland Company has always exer-
39858 cised its own individual judgment and discretion in the selection of its dealers except in so far as it was obliged by law to observe the definition of a dealer contained in the N. R. A. Cement Code. It does not select its dealers on the basis of any rule or definition, but selects them on the basis of what in its experience has shown to be the best for the company and its business.

18. The Cumberland Company has never been influenced in the selection of its dealers either by the recognition or non-recognition of certain concerns as dealers by competitors or by some building supply dealer association. The Cumberland Company has at no time had any arrangement, understanding, or agreement with anyone as to whom it would or would not sell or classify as a dealer.

19. Prior to the period of the N. R. A. there was comparatively little Federal Government business in the area where Cumberland markets its cement. Such bids as were called for, asked for f. o. b. destination bids, or bids alternatively f. o. b. mill and f. o. b. destination. In response to invitations requesting f. o. b. mill bids during this period the Cumberland Company submitted f. o. b. mill bids. Dur-
ing the existence of the N. R. A. Code, Cumberland bid prices which were on file with the Code Authority and in so doing adopted and began to use a so-called control clause which was filed with the Code Authority by one of the
39859 members of the industry as one of the terms and conditions of a bid made by it. Cumberland did not agree with anybody that it would adopt or use that clause nor did it on any occasion where it used that clause do so by reason of an understanding, agreement, or arrangement with any other Respondent. It adopted and used the clause because it was a method whereby the Government was able to purchase its cement f. o. b. Cumberland's mill if the Government so desired and at the same time enabled Cumberland to attempt to meet competition at destination, on the basis of which the Government always bought the cement.

20. Since the N. R. A. went out of existence sometimes Cumberland has quoted the United States flat f. o. b. mill

prices when requested and sometimes it has used a control clause. Its practice depended upon what it found other companies doing from time to time. In other words, Cumberland has tried to meet competitive conditions as it found them.

21. Cumberland has never known beforehand what prices competitors were going to quote on any business—except in so far as open price filing under the N. R. A. Code forbid quoting prices lower than those on file—and Cumberland has never known beforehand the manner in which competitors were going to quote.

22. The Cumberland Company has never taken any steps of any kind for the purpose of meeting or combatting imported cement competition. The Cumberland Company has never had any understanding or agreement
39860 of any kind with any Respondent with respect to the competition of imported cement.

23. The witness has never held any position with the Hermitage Portland Cement Company, nor do any salesmen of the Cumberland Company act for or represent the Hermitage Company in any way.

24. There has never been any arrangement between the Hermitage and Cumberland companies as to the percentage or share of business each or either will get in the markets which they serve.

25. The Cumberland Portland Cement Company has never had any arrangement, understanding, or agreement with any Respondent with respect to limiting or curtailing its production, or with respect to any percentage or share of the business available that each or either was entitled to. The several proposed plans for allocating business during the distress period of emergency under the proposal contained in the N. R. A. Code of Fair Competition for the Cement Industry were never accepted or adopted by the Cumberland Company, and the company has never been a party to any plan of any kind for allocating or sharing business.

26. The witness can recall no instance when the Cumberland Company has used a rate shown in the Cement Institute freight rate books which the company had any reason to believe was an incorrect or erroneous rate. The Cumberland Company does not have, nor has it ever
39861 had any understanding or agreement with respect to the use or non-use of The Cement Institute rate books, nor has the company ever had any understanding,

arrangement, or agreement that it would wait for correction notices or other notices from The Cement Institute before using any rate it cared to use.

27. If the Cumberland Company did not have the freight rate books published by The Cement Institute it would prepare its own compilation of rates in some convenient form. A compilation of freight rates from the cement shipping points to destinations in the area where it sells is an integral and necessary part of the information the company must have at hand in some quick and ready reference form in order to intelligently conduct its business.

39863 By Mr. Werle:

Q. Mr. Pearson, has the Cumberland Company, 39864 since its organization, ever given any quantity discounts?

A. No, sir.

Q. Can you tell me the reason for that?

A. I do not know that there is any economy in the sale of a large quantity over the sale of a smaller one; at least we have never been able to figure a discount to which the larger sale would be entitled.

Q. Did you participate at all in the preparation of the T. V. A. bids of your company and of the discussion in connection with them in the company?

A. I was present during the discussions; yes, sir.

Q. And can you tell me with respect to the bid of your company in March of 1934, which I believe is shown by an abstract of bids, Commission's Exhibit 397, whether or not the price that you bid on that invitation was arrived at by any understanding or agreement with any other cement company?

A. It was not.

Q. Can you tell me what were some of the factors which your company took into consideration in determining whether to bid on this first March invitation?

A. It was desirable business to us, that was one of the factors. It was delivered to points where good mill realization could be had. It was a special type of cement, however, that we had not before produced, but after giving it study we foresaw no difficulties in being able to 39865 produce it in accordance with the required specification.

Q. When you say you foresaw no difficulties, did you

have in mind that it could or could not be manufactured with the same machinery that you had in your plant at the time?

A. It could be manufactured with the same machinery, yes.

39866 Q. Well, Mr. Pearson, prior to the time that these T. V. A. invitations came out, do you know whether or not the Government was taking any steps for negotiating the purchase of the Cumberland mill?

A. Yes, sir.

39867 Q. How did that come to your attention?

A. We received an unannounced visit at the plant from Mr. Garity, the Director of Purchases, Dr. Locker, who was one of the principal engineers, and Major Edwin C. Eckel, who announced that they had in mind looking over our property with the thought that they might give consideration to its purchase by the Tennessee Valley Authority in order to produce their—at least part of the cement that would be required for the dams in the area.

Q. And with whom did these men discuss that matter on the occasion of this visit to your plant?

A. With me.

Q. There is some testimony in the record by Mr. Garity about this proposed purchase of your mill, to the effect that T. V. A. offered to pay $500,000 for the Cumberland mill, and with respect to the fact that Mr. Monday had made a counter-offer. Do you recall what the counter-offer was from your company?

A. I recall the figure as $2,000,000.

Q. Can you tell me whether or not that subject matter was brought to the attention of the board of directors of your company?

A. No, sir; it never was. I feel that Mr. Monday handled that on his own responsibility, that if he arrived at a figure that might be close, why, it would then be handled with the board of directors.

39871 Q. The record shows, I think, Mr. Pearson, that your company receives the statistics of The Cement Institute, and that you at one time received the statistics furnished by Mr. Mallory before he became connected with the Institute; is that correct?

A. That is right.

Q. To whose attention do those statistics come in your company?

A. They first come to my attention.

Q. And will you tell us what use you make of 20872 those statistics and have made of them in the past?

A. As to production and shipments, you mean?

Q. Yes.

A. I compile from the record that we receive from The Cement Institute each month a relative position of the individual shippers that are noted thereon. The report we receive covers one district, sixth, the Bureau of Mines' District 6, which is the only district in which we are interested in selling cement. The relative position that we bear there with respect to the other shippers in that area is a matter of interest to me and is called to the sales department's attention so that if we are on the bottom in percentage of shipments, or near the bottom—which, by the way, is the position that we have borne most of the time—

Q. Which position did you say you have borne?

A. The bottom, or near the bottom; among the 13 shippers we are usually tenth, eleventh, twelfth, or thirteenth, and as our percentage of shipments falls behind the average for the territory, it is called to the attention of the sales department and used as an incentive to them to make a more intensive drive in the sale of cement.

Q. And is that the sole purpose for which you used those statistics?

A. That is the primary purpose; yes, sir.

Q. Does your company have any agreement or 20872 arrangement with respect to the way in which you shall use those statistics?

A. None whatever.

Q. Have you ever found that any of your competitors have helped your company in any way to let you have business that was available?

A. No, sir.

Q. Have you considered, or could you describe in any way the activities of The Cement Institute as having formulated the policies and practices of the Cumberland Company?

A. To my knowledge, no practices that our company follows have been in any way formulated by The Cement Institute.

Q. In your position in the company, if there has been any such things as that would it or would it not have come to your attention?

A. Well, I feel that it would have come to my attention. You realize we are a very small company; in fact, there are only two paid officials in our company. That is the president and myself. Of course, we have department heads and other executives, but anything of an official nature I believe I have always known about.

Q. Can you tell me, just in answer to one question, Mr. Pearson, whether the Cumberland Company, so far as you are aware, has had any understanding or agreement or arrangement with competitor companies with respect to the marketing practices that it would follow or with
39874 respect to the prices which it would quote or the method which it would use to arrive at its prices?

A. Not to my knowledge.

Q. And with respect to that, would such an understanding or agreement of such a character come to your attention and your judgment?

A. I feel that it would; yes, sir.

39875 *Cross-Examination by Mr. Wooden.*

Q. Mr. Pearson, you said a few moments ago that the primary purpose of the statistics you got from the Institute was as you described. What other purpose did they serve, if that was the primary purpose?

A. Since I gave that testimony, I have been trying to recall some other purpose in there. I would now state that is the primary and sole purpose.

Q. As I understand you, Mr. Pearson, you have followed the policy of your company of following not only the prices but the practices of competitors?

A. That is true; in so far as we learn of them.

Q. When you say that the Institute has never influenced your practices and policies, do you know to what extent the Institute may have influenced the practices and policies of your competitors which you follow?

A. No, sir; I do not.

Q. For all you know you may be following in-
39876 directly some practices and policies of the Institute —influenced by the Institute through your competitors; is that correct?

A. Not to my knowledge.

Q. Well, that is just the point. You do not know whether or not you are following any of the practices of

the Institute when you follow the practices of your competitors; do you?

A. We try to follow the practices of our competitors, where we have found them and whenever we have learned them, without any knowledge where they acquired the practice.

Q. Have you been accustomed to consulting with Mr. Monday about the policies or practices of your company?

A. Yes, sir.

Q. You knew of Mr. Monday being chairman, did you not, of the Southeastern Division of the Institute?

A. I knew he was trustee for the Southeast.

Q. Trustee?

A. Yes, sir.

Q. Did you attend any meetings of the Southeastern Division?

A. I remember only one that I attended.

39877 Q. What was that?

A. That was one that at Knoxville, and the only business transacted was the reelection of the trustee.

Q. When was that?

A. I cannot state the year, Mr. Wooden.

Q. When you said that the Institute has never influenced the practices or policies of your company, did you take into account the minutes of the Southeastern Division that are in the record as Commission's Exhibit 547-3-W to 4-A, inclusive (handing the exhibit to the witness)?

A. I was not present at that meeting, and am not entirely familiar with it.

Q. Well, when you said the Institute had never influenced the practices and the policies of your company, did you have in mind any of Mr. Monday's activities, as trustee of the Institute?

A. The only knowledge I have gained from that exhibit, Mr. Wooden, has been the information I have received in some of the transcripts that I read in this case.

Q. And did your company receive the circular, of which Exhibit 547-4-C to 4-J, inclusive, is a copy (handing the exhibit to the witness)?

A. I am sure Mr. Monday and perhaps Mr. Dalbey, received that. I have no knowledge of it.

Q. Who is Mr. Dalbey?

39878 A. The minutes show that Mr. Dalbey—

Q. Who was Mr. Dalbey?

A. I beg your pardon?

Q. Who was Mr. Dalbey?

A. He is our sales manager.

Q. Did you have in mind when you testified as you did that, according to Commission's Exhibit 547-4-B, Mr. Dalbey did receive a copy of the circular to which I called your attention?

A. I don't know that he did or that he did not.

Q. Did you have in mind when you testified that the Institute had never influenced the policy of your company, that Mr. Monday, in Exhibit 547-4-C, said that those plans and interpretations were unanimously concurred in by all members of the Southeastern District, and approved at a certain meeting?

A. The only information I have, as I believe I previously stated, was the information I gained from reading some of the transcripts of this testimony.

Q. Well, you were not intending to speak authoritatively for your company as a whole when you testified that the Institute had never influenced your policy—just merely what you knew about it?

A. My own knowledge, of course.

Q. And you have testified that you did not know about these particular transactions to which I have called your attention?

39879 A. No, sir.

Q. What percentage has the production of your mill been to its capacity during the last three years?

A. The last three years?

Q. Yes.

A. We ranged between 40 and 50 percent in the last three years. I will change that to 52 percent. I think we reached 52 percent last year.

Q. What was it in April, 1938, Mr. Pearson?

A. In April, 1938, I could not give you that from memory.

Q. Somewhere around the figures you have already named?

39880 A. I know we had a considerable volume of business at that time because I know the jobs that we were shipping on, but I do not recall that particular month. Whether it was a 50 percent month of operation or a hundred percent, I could not state.

Q. As a matter of fact, there was not any three months'

period during that year when you were operating anything like full capacity?

A. No continuous three months' period; no, sir.

Q. Was there any month during that year in which you were operating anywhere near your full capacity?

A. I would say that there was.

Q. What?

A. But I cannot state which month.

Q. How near your full capacity were you operating?

A. For the whole year 1934?

Q. 1938.

A. 1938?

Q. Yes.

39881 A. About 46 percent—47 percent.

Q. You operated during the entire year?

A. Not continuously throughout the entire year; no, sir.

Q. When you discontinued trucking in August, 1932, there were competitive mills, were there not, in your territory that also discontinued?

A. Some of the mills continued to our time of discontinuance; yes, sir.

Q. Had all of them discontinued by the time you did?

A. I believe not.

Q. Practically all discontinued by the time you did?

A. I could not say how many. I do not think the Hermitage Portland Cement Company had discontinued at that time.

Q. Did it discontinue at the same time you did?

A. No, sir.

Q. Had Cumberland?

A. No, sir. I am sure it did not.

Q. Very soon thereafter?

A. I do not remember how long, but my recollection would permit me to say that it was seven or eight months later.

Q. Why was it that you kept on at one mill so much longer than at the other?

A. I know nothing about the Hermitage policy.

Q. The discontinuance of trucking as announced in August, 1932, by your mill at Cumberland had the effect,

39882 did it not, of enabling you to get business farther away from your mill?

A. I would not say that.

Q. Didn't it have the effect of enabling you to get business more easily at or around the location of other mills?

A. No, sir.

Q. Did you prepare or supervise the preparation of the questionnaire answers to the Clark and Burns questionnaire?

A. I assisted in that; yes, sir.

Q. I call your attention to Commission's Exhibit 976-12-Q, which is a part of your answer to the Clark and Burns questionnaire, and to question 5-III, and ask you to explain how you reconcile that with the statement you just made a moment ago to the effect that the discontinuance of trucking did not enable you to sell into the nearby areas of other mills and at the location of other mills?

A. I am afraid I misunderstood the previous question when I answered you, Mr. Wooden.

Q. All right. Will you explain what the facts were, then?

A. It is my thought that there would be some slight increase around the other mills when they discontinued trucking, but from our discontinued trucking I see—not where that would be of any assistance to us, because—

Q. In other words, your answer to the question was not dependent upon your discontinuance at your mill but upon the various mills, including yours, discontinuance?

39883 A. If any individual mill discontinued trucking it might enhance our opportunity to get some business. You understand our mill is located in a small consuming market. The town of Cowan is only 1,500 people.

Q. But when you and your competitors all discontinued trucking, that had quite an effect upon the distance to which you might go in your getting business at or near the location of other mills?

A. I would not say it had quite an effect; no, sir.

Q. Well, didn't it open up a greater market at or near other mill points, that discontinuance of trucking?

A. Slightly; yes, sir. Their discontinuing trucking, not ours.

Q. In other words, their use of trucking tended to prevent your getting into their mill points or into their mill points; is that right?

A. It did not prevent us from getting in; no, sir.

Q. Tended to, didn't it,—or how could the discontinuance of trucking enlarge your ability to get in there?

A. Slightly.

Q. Well, then, didn't it tend, also?

A. The tendency would also be slight.

Q. What is your measurement of slight in that case,—what is your standard of measurement?

A. The greatest amount of cement that was ever
39884 trucked from our plant in any year was 7 percent, and it ranged from less than one percent up to that. Any of those percentages would appear slight to me.

Q. But the amount of business that you might do at or near the mill points of other mills might not have any—might not be six or seven percent, or it might not be any definite percent. I do not get the connection between the amount of trucking you did and the extent to which the discontinuance of trucking affected your market territory?

A. We have no way of measuring that in actual percentage.

Q. Just a general characterizing when you say it had a slight effect of that sort?

A. It could not be much.

Q. Well, when Volunteer and Hermitage, for example, discontinued trucking, that enabled you to enlarge your business in Knoxville and in Chattanooga and Nashville, didn't it?

A. If there was any demand, it was slight.

Q. Well, it enabled you to enlarge it in those towns which were at or close to those mill points?

A. The potentiality there would be very small of any business that would be released.

Q. Those are important towns, are they not, from a consuming standpoint?

A. Yes.

Q. Well, when you spoke about disturbance to
39885 retail markets, you meant the disturbance of prices in among retailers, didn't you?

A. I did not mean by that that we in any way dictated or tried to control the re-sale markets of our customers.

Q. No, but when you said that trucking contributed to disturbances in the retail markets, you meant disturbance in price, didn't you?

A. I recall a specific instance on that; it is proper for me to make that statement, no doubt, in that a truck from a distant point was sold cement on the basis which I previously described. In place of taking it to the distant point

it sold it to a customer of one of our best dealers near the mill. Naturally he made a complaint that his cement—

Q. Sold it to him at a cut price?

A. That is right, at a price that he could not meet.

Q. Well, that is an illustration of the kind of disturbance you had in mind, isn't it?

A. Yes, sir.

Q. Well, now, you talk about protecting your dealers against other dealers invading their towns with cement. Would you permit one of your dealers to invade a town where there are dealers that are not customers of yours?

A. We might. I do not say that we have. If we could not get a local representation there on cement that we wanted to sell at that point.

39886 Q. As a matter of fact, you make the same rule, do you not, regarding dealers invading other dealers towns without regard to whether it is your dealer that is being invaded or not, don't you?

A. We might not be so rigid in the enforcement of that rule.

Q. But that is your rule, isn't it—you do not have one rule for one class of case and another rule for your own dealers; do you?

A. We are interested in the protection of our own dealers only.

Q. Well, then, you don't mean to say that where the dealer that is invaded is not your dealer; that you permit it to be done as a rule; do you?

A. If he is a good dealer, he ought to be our dealer, if we can't get one there.

Q. There are lots of good dealers that are not your dealers?

A. Beg pardon?

Q. There are lots of good dealers that are not your dealers, aren't there?

A. That are not our dealers?

Q. That are not your dealers.

A. My description of that dealer is not as good as if he were our dealer.

Q. Now, Mr. Pearson, let me get this straight: Do you mean to say that where you have a dealer in the

39887 town to which another dealer ships cement—

A. Do you mean another manufacturer?

Q. No, another dealer.

A. I beg your pardon.

Q. Another dealer takes your cement and ships it into the town of another one of your dealers, you won't permit that, will you?

A. We would not ship direct from the mill to that dealer.

Q. And would you permit him—all right, you would not ship direct from the mill.

A. He might take it to his town where we would ship it, and haul it in direct. We could not exercise any control over that.

Q. You cannot police that. But now do you mean to say that if your dealer asked you to ship into a town where you did not have a dealer, and where your dealer did not have a yard, that you would do it?

A. If we wanted that business bad enough we would, yes.

Q. Well, how badly have you wanted such business, tell me that?

A. Plenty, sometimes.

Q. Can you give me specific instances where you have shipped from your mill into the town of other dealers where the purchasing dealer did not have a yard?

A. I cannot recall a specific instance, but I am 39888 sure that has happened.

Q. You cannot give me a specific instance?

A. No, sir.

Q. How are you so sure it happened?

A. Well, I just cannot name the towns and the dealers, but I remember that it did happen at least one time.

Q. How long ago?

A. That has been two or three years ago. I will say three years ago, to the best of my recollection.

Q. Do you think you could maintain the good will of dealers if you shipped on the order of your dealers into other dealers' towns?

A. There are very few towns in the territory in which we would want to ship in which we do not have representation. The line which you draw there, Mr. Wooden, is more or less hypothetical in our case, where we do not have a dealer or could not get one, but we do not give consideration the protection of our competitors' dealers that we give to our own, that is the point I am trying to make.

Q. Not as much, but I am trying to develop what the extent of the difference is in practice.

A. Well, conditions might alter our actions there. There might be a dealer there we hope to get some time, and we would not ship in that territory because we would not antagonize them on our hopes.

39889 Q. That is the point I was getting at. Good will—in other words, it is not the good will of your existing customers but of hoped for customers, isn't it?

A. That is right.

Q. Now, as I understand it, prior to August, 1932, you permitted any customers of yours who wanted to come to the mill and take delivery in his own trucks, is that right, or trucks provided by him?

A. Any customer?

Q. Yes.

A. Not any and every customer. We only had a very few customers that made that request.

Q. Well, you permitted those who did make the request to do that?

A. At that time, so far as I recall; yes, sir.

Q. And the type of the customer who did that were mostly dealers?

A. That is right.

Q. Dealers near your mill or dealers some distance away?

A. Very few near the mill. They did not seem to care for the trucks.

Q. Were they dealers from large towns?

A. Well, not very many from towns such as Nashville or Memphis or Chattanooga, but towns such as Tullahoma, Tenn., with a population of 3,500; McMinnville,

39890 Tenn., Fayetteville, Tenn.

Q. And do I understand that you did not have such requests from dealers—from places like Nashville or Chattanooga?

A. Our Nashville customers continued to call for shipments by truck—by rail; I beg your pardon.

Q. How about Chattanooga?

A. The question, please?

Q. How about Chattanooga?

A. We have very little business at Chattanooga.

Q. Well, at that time did you have any customers who took delivery by truck from Chattanooga?

A. Never had one in Chattanooga.

Q. Now, what were the terms and conditions as to price on which you made such sales prior to August, 1932?

A. We first determined where the customer was from. We made him that destination price, if he hauled cement with his truck and handled it at his expense, less the railroad freight from our mill to that point.

Q. Did you take off the freight from your mill or from the—

A. From the destination price.

Q. Well, I mean, the freight between your mill and the destination, did you take—that is, the freight you took off?

A. Yes, sir.

39891 Q. Mr. Pearson, do I understand that the percentage of your sales and deliveries to trucks was about 6 or 7 percent?

A. In the peak year; yes, sir.

Q. In other words, prior to this change in policy, in August, 1932?

A. That was immediately prior, yes. It was increasing.

Q. Since then, what has the percentage of your truck deliveries been?

A. I don't know that I could relate the percentage. I am sure I would be safe in saying it was less than 1½ percent, and those infrequent deliveries arise from some contractor nearby who bought a carload, or somebody who closed an order and wanted to keep the job going. We tried to be considerate.

Q. Have such truck deliveries been to contractors, primarily?

A. No, sir. Do you mean during the trucking period?

Q. No; I mean since 1932.

A. To contractors primarily; yes, sir.

Q. You do not have any more dealers' trucks; is that the idea?

A. A few, in case of emergency, if they fail to order a car and need enough to hold them over until a car can arrive.

Q. And it is only in case of an emergency where 39892 a dealer wants an order filled like that?

A. That is the only time that they have ever requested it.

Q. This notice, Respondents' Exhibit 3061, was sent

out to whom? It does not appear to whom it is addressed (handing the exhibit to the witness)?

A. That was mailed to our customers, generally, with the individual heading written in.

Q. Mostly dealers?

A. Yes, sir.

Q. These contractors who have taken truck delivery since August, 1932, have used it on jobs, and not for resale.

A. Oh, yes.

Q. When did you begin to use The Cement Institute freight rate books?

A. At the time the publication was made to the various States in which we were interested. As to just when that was, I could not say.

Q. Were you a member of the Institute from the formation of it?

A. Yes, sir.

Q. I understood you to say that before that you compiled your own freight rate information from the railroad tariffs.

A. That is right.

Q. From what shipping points did you compile it from the railroad tariffs?

39893 A. From Cowan and from any mills that competed with us in our territory.

Q. Your compilation of freight rate information from other mills was for the purpose of pricing rather than shipping, was it not?

A. It was for the purpose of working back to find out what the actual prices were among our competitors; yes, sir.

Q. In other words, it was not for the use of your shipping from your mill at Cowan, but to enable you to determine what the prices were at destination?

A. I think that answer is obviously "yes".

Q. Do I understand that your company makes no use of freight tariffs at all since they began to use the Institute books?

A. None whatever.

Q. None whatever, for any purpose at all?

A. Our rate clerk has the Southeastern tariff, but he does not keep it complete to the minute, or have the supplements. He does not keep them up to date.

Q. Do you know where the information comes
39894 from that goes on your bills of lading?

A. From The Cement Institute freight rate books.

Q. Are you sure of that?

A. Absolutely.

Q. When was it that you made your estimate as to the saving between the cost of your traffic department before and after using the Institute service?

A. It was soon after the complaint was filed in this case. I would say some two years ago.

Q. You made it with a view of using it in this case?

A. I made that for my own information.

Q. What did the complaint in this case have to do with your making it?

A. To see where we would be if for any reason we had to surrender the use of The Cement Institute freight rate books.

Q. If you merely concerned yourself with the freight rate from your own mill, without regard to what the freight rates were from other mills, you would not need a very large force to ascertain that, would you?

A. Well, I would think it would take practically the same force that we used to have in that work.

Q. And what was that force?

A. It was a traffic manager and an assistant and a lady file clerk and stenographer—three of them.

Q. They also calculated the freight rates from
39895 other mills than your own; did they not?

A. They did.

Q. I am asking you if you calculated freight rates only for shipping purposes from your own mill, it would not cost very much, would it?

A. I could not agree with that.

Q. In other words, you do not believe it is necessary for you to calculate even the freight rates from your own mill, under the present arrangement?

A. Yes, sir.

Q. I understand that the traffic man that you had under the old arrangement, the former arrangement, is now your traffic manager?

A. He is now our shipping clerk.

Q. Shipping clerk.

A. Yes, sir.

Q. Billing and shipping clerk.

A. That is right.
Q. And what became of the other people that you had?
A. They were discharged—no longer needed.
Q. Two of them?
A. Two; yes, sir.
Q. And what were their duties?
A. I beg your pardon?
Q. What were their duties?
39896 A. What were their positions?
Q. Yes; what were their positions and duties?
A. One of them was assistant to the traffic manager and the other one was the young lady who handled stenographic and filing work for that department.
Q. What basing points chiefly affect the territory in which you do business, Mr. Pearson?
A. The one that affects our territory most is the Pennsylvania-Dixie mill at Richard City, which is about 35 miles away.
Q. How much freight advantage do you have in this area on that map, Respondents' Exhibit 3058, that area around your mill?
A. How much freight advantage?
Q. Yes.
A. Between us and Richard City?
Q. Yes.
A. I could not answer that question.
Q. Of course, it varies at different points in that area, does it not?
A. That is right.
Q. What is the maximum?
A. I could not answer that.
Q. Or the minimum?
A. No.
Q. Can you give us the range in the freight ad-
39897 vantage that you have there?
A. As shown by that map, it is a rather small territory.
Q. Yes; but can you give us the amount, or the range, rather, of the freight advantage in that freight advantage territory?
39898 A. No, sir; I would not.
Q. Is it as much as 20 cents a barrel?
A. I couldn't say.
Q. At any point in that territory?

A. That I don't know.

Q. Is it as much as 10 cents a barrel in any point in that freight advantage territory?

A. Well, I am sure it is.

Q. At the time you established your mill there at Cowan, what was the basing point that most affected your territory?

A. The Richard City mill was then and still is the closest mill to our plant.

Q. Was it then a basing point?

A. It was, yes, sir.

Q. In deciding to put a mill in at Cowan, did you not consider the amount of freight advantage you had over Richard City as a factor in deciding to build a mill there?

A. I am sure we did not give that much consideration at that time, Mr. Wooden.

30899 Q. You mean to say that you gave no thought to the pricing methods employed in the industry at the time you started your mill?

A. We knew nothing about pricing methods.

Q. You made no inquiry to find out the number of mills whose competition you would have to meet in selling the territory into which you might go?

A. At the time the Lumber Company decided to build this cement plant, I am sure that that was not given consideration.

Q. In other words, you went into the business without taking any account of the methods of pricing or the kind of competition that you would encounter; is that right?

A. That is right.

Q. You did not know at the time you went into the business that there was such a thing as a basing-point method of selling cement?

A. We found that out later.

Q. You did not find it out before you went into it?

A. No, sir.

Q. You found it out after you started selling cement?

A. Yes, sir.

Q. You did find it out before you began to sell?

A. Yes, sir.

Q. You employed a man who is familiar with the methods employed in the industry with regard to pricing?

30900 A. I am sorry; I did not get that question.

Q. I say, you employed a man, did you not, to

handle your sales who was familiar with the pricing methods used in the industry?

A. Yes, sir. We did not hire him primarily for that purpose.

Q. That was Mr. Dalbey?

A. No, sir.

Q. Who was that?

A. Mr. R. T. Miller.

Q. With whom had he worked before?

A. He had been with—he came from the Hermitage Portland Cement Company to our company.

Q. Will you tell me why it is, Mr. Pearson, that you have a sales territory extending away down into Mississippi, clear to the Gulf, while in Alabama you just go into the extreme northern portion of the State?

A. One of the reasons, Mr. Wooden, is that during recent years the State of Mississippi has had a tremendous paving program and use large quantities of cement, and at the time that this highway program started, back, I believe, in the year 1935, we employed a full time salesman to handle the State of Mississippi exclusively.

Q. Did you sell direct to the State?

A. The State Highway Department.

29901 Q. Yes.

A. And contractors for the State Highway Department were both sold direct. Of course, we always have sold dealers in the State of Mississippi.

Q. Your mill net on sales into that lower part of Mississippi was much less than on your sales into northern Alabama; is not that so?

A. They are somewhat lower.

Q. Are they not substantially lower?

A. Well, we don't go very far into the southern part—we don't go into the southern part of Mississippi with a very large volume of cement. We do sell some.

Q. Are not your mill nets on the bulk of your Mississippi business substantially less than on the northern Alabama business?

A. Most of our Mississippi sales are made north of Jackson, and the nets there are not very far below than the average nets received in the State of Alabama.

Q. When you say not very far what do you mean?

A. Well, I do not recall the figures as between those, but I know it is profitable territory for our mill.

Q. Is there a difference of as much as 25 cents a barrel?

A. That Mississippi would be below Alabama?

Q. Yes.

A. I cannot say that it would.

39902 Q. Twenty?

A. No, sir.

Q. You are sure it would not be as much as 20 cents less?

A. I am sure it would not be.

Q. Are you speaking now on the average or as to all points in the State?

A. Well, I have never made any average as to all the shipments we make in the State of Alabama compared to the average realized from cement shipments into the State of Mississippi.

Q. Then, you mean, do you, in no case in Mississippi is your mill net more than 20 cents a barrel less than your mill net in Alabama?

Mr. Werle: I am going to object to that question, if Your Honor please, on the ground that the only possible inference that Government Counsel could draw from this difference in mill nets is to indicate that on the higher net business there must be some excessive or unreasonable return to the company. I do not see any other inference or argument that could be made from it.

Trial Examiner Norwood: I think it throws some light on this method of shipping beyond his immediate territory.

Mr. Werle: Well, it strikes me that this is a new device now to get into the record the same facts from which that other inference is to be drawn.

39903 Trial Examiner Norwood: Well, that is not clear. Let us go ahead.

Mr. Wooden: It is the same thing as—

Trial Examiner Norwood: The objection is overruled.

Mr. Wooden: —as the whole count 2 of the complaint is based upon difference in mill nets. It is the question of alleged discrimination. Surely we can find out what the amount of that discrimination is.

Mr. Brick: If Your Honor please, on that point, that is established as far as the facts are concerned as soon as the witness states that there is a difference, and we contend that to the extent that Mr. Wooden goes further,

in trying to show just what those differences are, that he is arguing either unreasonableness or something which he has not disclosed.

Trial Examiner Norwood: I do not think so.

Mr. Brick: And on the question of unreasonableness, we object to it because we have been precluded from meeting that kind of evidence.

Trial Examiner Norwood: The objection is overruled. Read the question.

(Question read.)

The Witness: Shall I answer that, Your Honor?

Trial Examiner Norwood: Yes.

A. I do not know.

20904 By Mr. Wooden:

Q. What has been the range in your mill nets in toto as you remember?

A. The high and the low?

Q. Yes.

A. Well, the highest mill net that we have ever received is at Cowan, of course. At times it has been as high as $2.07 a barrel. A very small proportion of our cement is shipped to Cowan.

Q. And the low?

Q. What was the low compared to that?

A. Well, the lowest one that I recall was when the price of $2.07 at Cowan prevailed, would be not lower than $1.07 at the low end of the range.

Q. And that same time, what was your mill net on Chattanooga business?

A. On Chattanooga?

Q. Yes.

20905 A. I could not state.

Q. How much difference between Chattanooga and Cowan would there be?

A. I believe the freight per barrel to Chattanooga is about 38 cents. I would not be positive of that.

Q. Aren't your mill nets over in this territory shown on Respondents' Exhibit 3055 in South Carolina and North Carolina substantially less than those in Alabama, northern Alabama?

A. I cannot say that they are substantially less.

Q. Well, what do you mean by "substantially," as much as 25 cents a barrel?

A. "Substantially" could mean rather wide range.

39909 Q. Mr. Pearson, what percentage of your cement has been sold at delivered prices?

A. Has been sold at what?

Q. Delivered prices.

A. I do not know the exact percentage, but most of it.

Q. Well, on the basis of delivered price quotations, has it been as much as 98 percent?

A. It probably has. We have made few sales to the railroads, on f. o. b. mill prices; we have made a few sales to the United States Government agencies on f. o. b. mill prices. That percentage would be a guess on my part. I do not know. An appreciable part, however, is sold on delivered prices.

Q. So far as your dealer business is concerned, what percentage would you say?

A. A hundred percent.

Q. And your dealer business has comprised what percentage of your total business?

A. Well, that has varied, of course, in different years. If you wanted me to make a close estimate on a general average over the whole period, I would say about 60 percent of our total business has been sold through dealers.

Q. The next largest class of customers has been
39910 what, contractors?

A. Highway contractors; yes, sir.

Q. And they are also sold on delivered basis?

A. That is right.

Q. Your source of information as to secret price cuts or secret price concessions, what is your source of information on that?

A. Well, I have participated in some of them myself, and conversed with the sales manager of our company in connection with it.

Q. That is speaking of your own; how about competitors, what is your source of information there?

A. It has come from our customers and our prospective customers.

Q. Haven't you found that your customers sometimes make representations that you can hardly, or cannot safely rely upon such situations?

A. Well, those people with whom we discuss such

things are friends of ours, whose integrity—for whose integrity we have respect.

Q. But you recognize, do you not, that buyers in general sometimes are likely to make representations of that sort for the purpose—

A. We do not deviate promiscuously. We try to assure ourselves that the information we have is truthful information.

Q. In other words, you do not rely upon all of 39911 that information that you get from all soufves?

A. We hear lots of things we do not believe.

Q. Things of that kind?

A. Yes, sir.

Q. In other words, you have reason to believe that some of your customers try to make you believe that they received a better offer from a competitor when you do not believe they have; is that right?

A. I have had that happen; yes, sir. We do not sell them when we believed that.

Q. In what percentage of your business have you made concessions below the regular destination price?

A. Well, now, that is another percentage question that you are asking me for, Mr. Wooden, and I have never made any figures on it. Any answer on that would be more or less a guess.

Q. What is your best—

A. It is a small percentage.

Q. Is it less than 5 percent?

A. Well, do you mean throughout the entire time since we have been in business—do you mean some particular year? Those conditions have been bad at times.

Q. Suppose we confine the question to a period from 1923 to July, 1937.

A. V. H. I think your 5 percent is not far wrong that 39912 you mentioned.

Q. And that would include your contractor business?

A. Did you say exclusive?

Q. That would include your contractor business?

A. Yes, sir.

Q. If you took your dealer business, the percentage would be considerably less than the 5 percent, wouldn't it?

A. No, I do not understand you there. I thought you mentioned the 5 percent as the whole volume of business.

Q. That is right.

A. Including dealers, contractors, and everybody.

Q. That is right, but now I am separating the dealer business from the whole, and asking you if the percentage of deviations would not be much less than 5 percent.

A. They would increase.

Q. On dealer business—I mean the percentage of cases where you made prices less than regular destination prices to dealers.

A. Very few have been made to dealers.

Q. That is what I am getting at. Would it be as much as one percent in the case of dealers' business?

A. Your guess is about as good as mine there.

Q. Well, it should not be. You are familiar with the business.

A. I just did not figure it out. I never have.

39913 Q. Well, at any rate, do you think it would be substantially less than on your business as a whole?

A. That is right.

Q. How many destinations do you check to ascertain whether a price change is a general change?

A. In case of an advantage in price?

Q. Well, either an advance or decline—the differential?

A. We check enough to satisfy ourselves that it is a general price change reflected at some particular point. It might be a dozen or it might be twenty. I do not know that we use any particular number.

Q. It depends upon the circumstances, I suppose?

A. Yes, sir.

Q. And the territory in which the changes occur, and all that.

A. Yes, sir.

Q. How many destination points do you have dealers located in?

A. Well, that is another figure that I would have to guess at. I would say that we ship into some four or five hundred destinations in the southeastern territory.

Q. And you solicit in a larger number of destinations than the ones you ship into, do you not?

A. That is right.

Q. As many as three or four thousand?

39914 A. Oh, no.

Q. Two thousand?

A. One thousand would be a good figure.

Q. Can you cite any particular instance where your company did not follow a price advance made by your competitors?

A. No, sir.

Q. When you speak about being competitive at various destinations with your prices, you mean, do you not, having your price there as low as the lowest?

A. That is right.

Q. And I understand you have never taken the lead in either reducing or advancing the price at your mill?

A. No, sir.

Q. When you say in your stipulated testimony that Article XI of the Code expresses the practices which your company had been following, for the most part, for several years prior, can you tell us what you mean by "the most part," or what part was not being followed?

A. Well, I had occasion to review Article XI in the Cement Code recently, and I am sure that that is a factual statement in there, as to what we have done, but to repeat those item by item, I could not do that.

Q. And when you say Article XI represented practices which you have been following, for the most part, you cannot tell us in what part or specify in what respect you had not been following those practices before the

38915 Code?

A. Well, I could not say that we followed them 100 percent, but at the same time I could not relate some places where we deviated from those practices that are set out there.

Q. And there were some respects in which your practices prior to the Code was not exactly in accordance with Article XI, were there not?

A. I am sure there were some; yes, sir.

Q. But you cannot tell us what they were?

A. Not without giving it considerable study; no, sir.

Mr. Wooden: Your Honor, because of that testimony, I move to strike paragraph 14 of the stipulated testimony.

Mr. Weele: Well, before Your Honor even entertains the motion; I would suggest that the witness be shown a copy of Article XI, so that he will have an opportunity to state with respect to the items there, to the best of his recollection, whether or not he did. This examination has been proceeding without the witness having had a chance to see the copy.

Trial Examiner Norwood: I think the witness should see it.

Mr. Wooden: He said he had recent occasion to study it in its entirety. Then he comes in and brings in this stipulated testimony on these generalizations, and he is unable to give us any facts or details—

39916 Mr. Werle: I do not see that details are necessary, when he states that, substantially, it has been his practice.

Trial Examiner Norwood: Show him those practices and let him tell us which ones he was carrying out prior to the adoption of the article and which ones he was not and in respect to those which he was carrying out, in what proportion of the cases.

Mr. Brick: That can be done, if we are going into every detail.

Trial Examiner Norwood: Your associate has questioned this procedure here, and I am ruling on it. Let us see if he can tell us.

By Mr. Wooden:

Q.—I will show you Article XI of the Code, being Commission's Exhibit 557, and will ask you to specify what practices you were following before Article XI was adopted and which practices you did not follow after its adoption.

A. Well, as regards items 1 and 2 of Article XI, we followed those practices before the Code. Item 3, the definition of a dealer, I believe, we stipulated in there that our definitions of a dealer were not, perhaps, as rigid as stated here. That would be one of the qualifications that meet the "most part" phrase in there. We followed item 4. We followed item 5. We followed item 6. We followed item 7.

39917 Q. Will you call attention also to any items that you did not follow as you come to them?

A. I beg your pardon?

Q. Will you call attention to any items that you did not follow?

A. We may not have rigidly followed item 3. That is the only one I have found so far. All the rest, for the most part, we followed.

Q. When you say "for the most part," that you followed that, do you mean that in some cases you did not follow it?

A. I was just trying to use this phraseology that is in the stipulation there.

Trial Examiner Norwood: Do you mean that you did follow them invariably, or that you did not?

The Witness: Sir?

Trial Examiner Norwood: Do you mean you followed them invariably, or there were exceptions at times?

The Witness: Very rare exceptions.

By Mr. Wooden:

Q. Well, the dealers, as a matter of fact, were pretty well organized to put forward their views on such matters long prior to the N.R.A. Code; were they not?

A. That is what we found every competitor doing, and we followed them.

Q. Did you not find the dealers pretty well organized to offer their views on such questions prior

39918 to the N.R.A. Code?

A. We have never had much trouble with dealers' associations or any groups of dealers.

Q. I did not ask you if you had trouble. I asked you if they were not pretty well organized to do it.

A. We did not find it so.

Trial Examiner Norwood: I will deny the motion to strike that portion of paragraph 14.

By Mr. Wooden:

Q. Mr. Pearson, it is stated in your stipulated testimony that you made quotations to the Federal Government f. o. b. mill. Did you have in mind the cases where you quoted destination costs with the control clause attached?

A. Yes, sir.

Q. Did you have any other kind of cases in mind?

A. Well, we made some quotations to the War Department on the Mississippi River, at destination price, less the commercial freight, or at the known price, the known destination price, less the commercial rate.

Q. Was that prior to the N. R. A. Code?

A. The N. R. A. Code was in 1934?

Q. 1933, 1934, and 1935.

A. I believe that was subsequent to the Code.

Q. When?

A. Subsequent to the Code.

39919 Q. When?

A. It could have been after the Code, in 1935, or could have been prior to it, in 1934.

Q. When, subsequent to 1935, was it that you quoted the Quartermaster Department of the War Department at destination price and allowed a deduction of the commercial freight?

A. I don't remember the exact time as to when it was.

Q. Was it at any time since July, 1937?

A. No, sir; not the instance that I have in mind.

Q. You cannot fix the time within any particular year?

A. No, sir; not as to the particular year.

Q. What did you mean by your stipulated testimony that since the N. R. A. went out of existence you sometimes quoted the United States Government flat f. o. b. mill prices when requested?

A. Does it say flat f. o. b. mill prices?

Q. Yes.

A. We followed the control clause practice in some instances since then.

Q. Is that what you call flat f. o. b. mill prices?

A. No, sir; I would not call that flat f.o.b. mill prices.

Q. What did you mean by stating in your stipulated testimony that you quoted the flat f. o. b. mill prices, when requested?

A. There have been a few recent occasions when—

Q. Since when?

39920 A. Probably since the complaint was filed.

Q. As a matter of fact, that was one reason you did not quote the mill price in the Good Friday bids, because it requested a flat f. o. b. mill price?

A. That was where they asked for an alternate bid, both delivered at destination and f. o. b.

Q. I am talking about the Good Friday bids. You did not quote there, for one reason, because of the flat f. o. b. mill price that was requested.

A. That was one of the reasons, yes, sir.

Q. You say in paragraph 26 of your stipulated testimony that you never had any reason to believe an incorrect or erroneous rate was shown in the Institute freight rate books. You received from time to time correction sheets, did you not?

A. That is right.

Q. Did you know that many of those correction sheets were effective immediately?

A. Those correction sheets did not necessarily cover an error. They might have covered a change in rates.

Q. How do you know, if you did not check against the railroad tariffs?

A. We did not check.

Q. Then, you would not know?

A. No; we put them on the bill of lading, and if they did not come back from the railroad, they would ac-
39921 cept those rates as we had written them in.

Q. Don't you know that the railroads cannot put in changes in rates effective immediately?

A. They might not on interstate rates, but they may sometimes on intrastate rates.

Q. Don't you have correction sheets from the Institute showing changes in freight rates that were effective immediately?

A. Yes, sir; I know that they do that.

Q. Did you not consider that those showed that some erroneous rates were being corrected?

A. I didn't have that information, that they were.

39922 *Redirect Examination by Mr. Werle.*

Q. Do you have a price at your mill?

A. No, sir.

Q. Can you tell me what was the condition of the cement demand in 1925 and 1926, when your Lumber Company was considering building a cement mill?

A. Well, the cement business at that time, according to the information that we received, was quite flourishing; the volume was heavier than it has been in some subsequent years.

Q. How far is Cowan from Nashville?

A. Eighty-seven miles by rail.

Q. By road?

A. By highway it is 98 miles.

Q. And how far from Chattanooga by highway?

A. Sixty-four.

Q. And how far is Cowan from Tullahoma?

A. Tullahoma is 18 miles by rail; 24 miles by highway.

39925 Washington, D. C.,
Monday, June 3, 1940.

39936 D. S. COLBURN was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

39940 Mr. Wooden: We have already agreed that the witness would testify, if permitted by the Examiner, to the contents of the substance of paragraph 14.

Mr. Zimmerman: And that that may stand as our offer of proof, the same as if I proceeded by question and answer?

Mr. Wooden: It may stand as an offer of proof.

39[illegible] *Cross-Examination by Mr. Wooden.*

Q. Mr. Colburn, I understand you became assistant to the president of the Marquette Cement Company in the late spring of 1933?

A. Mr. Wooden, that was merely the conferring of a title on work which I had been doing for quite some time previous.

Q. What work had you been doing prior to the late spring of 1933?

A. Well, how far back do you wish me to go?

Q. Well, immediately prior, and then trace it back.

A. I will try to go backward.

I had got to working in very close connection with Mr. Dickinson; in fact, had been authorized by Mr. Dickinson to represent our company in all of the N. R. A. proceedings and meetings which dealt with the N. R. A. I also had charge of the construction of the cement plant at LaSalle, Ill., directly under Mr. Dickinson's direction.

Q. When was that?

A. That was in the winter of 1928 and 1929. My work was—well, I called it service work, which was rather a broad term, principally to try to handle things which there did not seem to be any personnel to handle within
39942 the organization, and complaint work.

Q. What kind of complaints?

A. Oh, where a customer would have some trouble and think it was possibly the fault of the cement, or where a

customer had some trouble and did not know what the trouble was, and I recall distinctly being sent to one large job in Arkansas, which Mr. Dickinson had visions of falling down and creating a lot of bad reputation for our company, and that was done directly under his supervision.

Q. You were an engineer, weren't you?

A. Yes, sir; I came in as an engineer.

Q. All right. What else did you do immediately prior to the spring of 1923?

A. I worked in the sales department. I tried to sell cement, also.

Q. You worked in the sales department?

A. Yes.

Q. Under whom?

A. Under Mr. Dickson, always.

Q. You were not sales manager, were you?

A. No, sir; I was not.

Q. What was the nature of your sales department duties?

A. To try to sell cement.

Q. Did you have a territory?

A. No, no.

39943 Q. Did you travel?

A. No. I was a freelance.

Q. Who was the head of the sales department?

A. At what time?

Q. At that time.

A. Well, at what time do you mean?

Q. At the time you said you were sort of a freelance in the sales department.

A. Immediately previous to 1923?

Q. Yes.

A. Well, as I recall, the sales manager at that time was a Mr. Peyton.

Q. Peyton?

A. Yes, Peyton, P-e-y-t-o-n.

Q. Did you serve under him?

A. I was supposed to serve under him but I took all my orders from Mr. Dickinson.

Q. Did you travel any territory in your sales duties?

A. I traveled no territory.

Q. Just what did you do?

A. Tried to sell cement wherever there was some to be sold.

Q. Well, how did you correlate your efforts with the sales manager?

A. I did not correlate them with the sales manager.

Q. You mean, you covered a different territory
39944 or different class of trade or different work than the sales manager?

A. No. I covered jobs as they came up and was told to go out and sell them, or attempt to sell them.

Q. Was it any particular class of jobs, or type of jobs?

A. No, no, not any particular type of job; large tonnage, that is all.

Q. Was it largely State highway work?

A. No, not largely so.

Q. How large tonnage did you have?

A. At what time?

Q. At that time, prior to the spring of 1933.

A. Well, now, that is a figure that I do not carry in my mind, Mr. Wooden.

Q. Well, can't you give us some idea of what your work consisted of that did not conflict or overlap, if I may use that word, with that of the sales department under the sales manager?

39945 A. Well, Mr. Wooden, there were times I presume our work did overlap because Mr. Dickinson was an individual who did not confide in many people as to what he wanted done or as to what he was doing. I will state that I recall several times that he ordered me to do things which I must not advise the sales manager or the secretary or treasurer or anybody else within the organization that he was ordering me direct to do certain things.

Q. In the sale of cement?

A. In the sales of cement.

Q. Did he order you to make special prices, or something of that kind?

A. Order me to make prices to get business.

Q. Special prices?

A. Well, what do you mean "special prices"?

Q. Lower than your usual going prices?

39946 A. Oh, we made our prices to fit the jobs as they came up.

Q. Well, is your answer, then, that on occasion you did make special prices on large jobs lower than your going prices?

A. Yes. I think that is right.

Q. Did you call on any dealer trade?

A. Very few.

Q. In other words, your business—your functions were largely confined to the solicitation and sale of large jobs that were being bought without the intervention of the dealer; is that right?

A. That is about right.

Q. And of that type of business, what were the most important kinds?

A. Well, there were locks and dams and buildings of types of work that use concrete.

Q. Highway business?

A. I did some work in the highway end of it in 1933; that is right; during 1933 I did some work at that time.

Q. Well, now, when did you begin that type of work with Marquette?

A. Well, Mr. Wooden, I done some of that kind of work ever since I been with them.

Q. And that was early in 1924?

A. 1924, yes, 1925. I recall my first—early in 1925—going out on the first big job.

39947 Q. And from the time you began, say, about in 1925, you kept that up until when?

A. Well, until I became a vice-president, when my duties became a little too heavy to continue to do that kind of work.

Q. Did anyone succeed you in that type of work?

A. No.

Q. Did that type of work, that type of solicitation, was discontinued, then, was it?

A. No. I would not say it was discontinued.

Q. Well, who did it?

A. The sales manager.

Q. Do you mean that they continued to make special prices on large jobs?

A. If they saw fit to do so; yes.

Q. Well, did they do it? Can you cite some cases where they did it?

A. No; I cannot cite any cases now.

Q. As a matter of fact, there was a change in your company policy about 1932—I mean in respect to that kind of solicitation, wasn't there?

A. There was not.

Q. About 1933?

A. There was not.

Q. Do you mean to say that under the N. R. A. Code you made lower prices than the ones that were filed
39948 with the Code Authority?

A. No, we did not.

39949 Q. When you said, Mr. Colburn, that your company continued to make special prices lower than your going regular price, did you intend to make that answer apply to the period covered by the N. R. A. Code?

A. No, sir. Not during the N. R. A. Code period. We either filed the price or met a price that was filed.

By Mr. Wooden:

Q. Can you cite any instances after the N. R. A. Code where on large jobs you made special prices lower than your going prices?

A. I cannot quote you any instances.

Q. Will you name some of the large jobs prior to 1933 on which you made special prices?

A. I cannot name you any examples.

Q. Don't you recall making any special prices lower than your regular going prices on some important State highway business?

39950 A. No, I cannot recall any particular instance, Mr. Wooden.

Q. You do not even recall that first one that you referred to when you began your work in 1925?

A. I am going to differ with you there. That was not my special price. That was the first large job I worked on.

Q. I say, what was that?

A. I recall that quite distinctly because that was river work on the Ohio River locks and dams.

Q. Federal Government project?

A. Yes, sir.

Mr. Zimmerman: I assume he wants you to tell about it.

By Mr. Wooden:

Q. Well, is that the only particular job that you can recall during your several years work on this special assignment under Mr. Dickinson?

A. Well, it is all I can recall, Mr. Wooden, because I do not make a practice of carrying that stuff around in my head.

Q. You would not even remember jobs that might involve a million barrels, or more?

39951 A. Oh, I do not ever recall selling a million barrels of cement on one job, myself.

Q. You say you do not?

A. No.

Q. And did you handle bids, your company's bids; to the Illinois State Highway Commission in 1932?

A. 1932, I did not handle them. I did not make those out, but I handled them at Springfield.

Q. You handled the negotiations?

A. Yes.

Q. Did you handle the business on the same—the same business in 1933?

A. I did up to a certain point, not all the way through.

Q. What point was that?

A. That was the point where, after this Act had been passed at Springfield, permitting the State to negotiate a contract with some reference to the previous bids; I did not handle that from there on. I was in Chicago while that was handled.

Q. But, then, the 1933 bids, the submittal of the bids, you did handle that?

A. Yes, I handled that.

Q. I am showing you Commission's Exhibit 2604-A to F, inclusive. I will ask you if that is the way in which you prepared those bids for the April, 1933, Illinois Highway bidding?

Mr. Zimmerman: Well, just a moment. Let me
39952 look at that before the witness answers. I want to see what—this is a document received in evidence as Commission's Exhibit 2604-A?

Mr. Wooden: A to F.

39953 A. Well, that still is not clear to me. There is nothing in here to indicate who might prepare a bid.

By Mr. Wooden:

Q. Didn't you use the method shown in Commission's Exhibit 2604-A to F as the method you employed
39954 for making up the destination prices to be bid at all the county seats in Illinois?

A. I will be frank with you, Mr. Wooden. I did not make this up.

Q. I did not ask you if you made that up. I asked you—

A. I do not know at this time whether that was the method or not.

Q. Can you tell what method was employed at this time?

A. No, I cannot.

Q. You handled those bids and yet you cannot tell us what method was employed in making them up?

39955 Q. Well, in your stipulated testimony, Mr. Colburn, you say that Marquette has generally sold its cement at destination prices. Do you mean by that it has also quoted its cement for sale at destination prices?

A. Well, a sale is the result of a quotation always. You cannot sell until you do quote.

Q. But Marquette has also made its destination prices openly, has it not,—quoted, quoted them openly?

A. Not always.

Q. That was the time, during the period when you were doing this special work it did quote some special prices that were not openly quoted?

A. Yes, sir.

Q. Can you cite any cases after you became assistant to the president in 1933 where you made special prices that were not openly quoted?

A. Well, we are getting into the Code period. Mr. Wooden, there was none made during the Code period.

39956 Q. Any time subsequent to the Code period down to July, 1937, where you can specify special prices?

A. I am satisfied we did, Mr. Wooden, but I could not quote you any example.

Q. Is that out of your field, then?

A. It was getting out of my field.

Q. Do I understand that after 1933 that you no longer had anything to do with sales?

A. No, sir. If you understand that you are incorrect.

Q. Well, I want to clear it up. What did you have to do with sales subsequent to 1933?

A. Well, still at that—from then on up to the time of the complaint, I had interested myself in sales and estimates for the year as to what we wanted to ship and correlated our manufacturing operations to fit in with it, keep a check on it every month, maybe every 15 days during the heavy shipping season, and to be sure that we had the right type of cement on hand to fill the orders which we had, to be sure that we had tested cement that we could fill whatever orders called for tested cement.

Q. Well, after you became assistant to the president in the spring of 1933, what did you have to do with the quoting of prices?

A. Well, just one of several who determined what the prices should be.

39957 Q. When you talk about determining what the prices should be—

A. Well, now, will you pardon me if I ask a question, please?

Q. Yes.

A. Are you talking about general quotations or special quotations?

Q. I am talking about both, so far as your duties were concerned.

A. All right.

Q. So far as what you did.

My understanding was that after 1933 and on up to July, 1937, you did not, yourself, make any special quotations; is that right?

A. All I would say is that there was none made during the N. R. A. period that I made; not outside of that, Mr. Wooden, I do not recall.

Q. You know nothing of any others?

A. I do not recall any at this time. I do not recall any specific instances.

Q. When you talked about a general quotation, you meant, did you not, a quotation at one or both of your mills that would affect the destination prices over a wide territory?

A. The only quotations made at our mill were made to the United States Government.

Q. Do you mean to say that at no time was your

39958 mill at Cape Girardeau a basing point?

A. We do not quote a base price at Cape Girardeau. We quote the destination cost—destination prices, except in cases to the United States Government, where we quote a mill price.

Q. Do you mean to say that at no time was Cape Girardeau a basing point?

Mr. Zimmerman: He has answered that question. That is the second time that in so many words he has answered it. He has answered it fully, and I object to the repetition.

Trial Examiner Norwood: Objection overruled.

The Witness: The question again, please?

(Question read.)

A. What do you mean,—a basing point?

By Mr. Wooden:

Q. Do you mean to say that you have been in the cement business for 15 years and do not know what a basing point in the industry is?

Mr. Zimmerman: I object. He is trying to find out from the witness what he, the examining counsel, understands and infers by that question.

Mr. Wooden: I want to know what the witness understands.

Trial Examiner Norwood: Ask him the question.

Mr. Zimmerman: There have been as many defi-
39959 nitions given here as there are persons in the room.

By Mr. Wooden:

Q. I will ask the witness what he understands a basing point to be.

Mr. Zimmerman: He has not testified that he understands anything about a basing point, and there is not one single thing in this stipulation which refers, directly or indirectly, to a basing point. That goes away beyond the confines—

Trial Examiner Norwood: The objection is overruled. Proceed.

Read the question.

The Witness: Read the question, please.

(Question read.)

Trial Examiner Norwood: Answer that question.

A. Well, my idea of, and I still don't call it a basing point, is a mill net which we take at our plants to determine what our delivered prices are going to be.

By Mr. Wooden:

Q. In that sense, do you mean to say that Cape Girardeau was never a basing point?

A. Taking my interpretation of a basing point to mean our mill price, I will say that we do have a price at our mill net that we use in determining our delivered prices.

Yes, that is true. I don't want to call that a basing
39960 point, because that is a misnomer to me.

Q. You have heard it called that?

A. I have heard it called everything.

Q. You have heard it discussed in the industry as a basing point?

A. I have not.

Q. Never? You did not know it was common practice in the industry to call such points basing points? Is your answer "No"?

39961 A. Well, I don't know whether it is a common practice or not. I have heard them called basing points.

Q. On what occasions?

A. Well, I can't tell you that. I don't recall that.

Q. Not even in a general way?

A. No.

Q. You have heard them discussed as being basing points, in talking to competitors' representatives?

A. No, not necessarily. It is just one of those things I don't recall. I have heard them called basing points, and that is as far as I can go on it.

Q. You say "not necessarily."

A. No.

Q. Have you not discussed the subject of basing

39962 points with your competitors?

A. I have not.

Q. Never talked to your competitors—

A. No.

Q. Never?

A. No.

Q. Well, then, where did you hear the expression?

A. I am telling you I don't know where I heard it, now.

Q. Did you not discuss prices based on basing points in your dealings with the State Highway Commission of Illinois?

A. I talked delivered prices with the State Highway Commission of the State of Illinois.

Q. Do you recall discussing with them the making of those delivered prices on basing points?

A. I did not.

Q. You have made up bids and quotations of destination prices based on basing points, have you not?

A. No, sir.

Q. You never did?

A. No, sir.

Q. How do you make your destination prices that you stipulated that you generally quote in selling?

A. We quote our mill price, mill net that we want to get, add to it the freight to the various destinations, and—

Q. Rail freight?

39963 A. Rail freight, and that is what we want to secure. We, however, run into cases where other companies have quoted a delivered price which was less than the one we had computed in that case, and in that case we must meet that delivered price. We cannot get more than they get.

Q. Did you not ever figure back from such delivered prices that were lower than yours to find out whether they did not reflect a constant figure at some mill?

A. Yes; we have done that.

Q. And when you have found that constant figure at some mill, have you not then applied that to other destinations than the one for which you had specific information?

A. We took what the other company's net would be and tried to determine what their delivered price would be at the same points that we quoted; yes, sir.

Q. By adding the rail freight from there?

A. That is right.

Q. From their mill?

A. That is right.

Q. Then your quotations would be made up and issued accordingly?

A. That is right.

Q. Now, there are some mills, are there not, that do not reflect any constant mill net at their mill?

Mr. Zimmerman: Just a moment. You are re-

39964 ferring to the Marquette Company mills or the mills of competitors?

Mr. Wooden: Competitors.

A. Yes.

By Mr. Wooden:

39965 Q. And you are in competition with some such mills, are you not?

A. Yes.

Q. How do you handle such cases when you figure back and do not find any constant mill net? Then what do you do?

A. Ignore it.

Q. In other words, you base your prices only upon the cases where your calculations show that a constant mill net is reflected?

A. Right.

Q. Your stipulated testimony, in paragraph 3, states that your company has not received generally any request to sell otherwise than at destination prices, except to the United States Government. Have you received some requests to sell at other than destination prices?

39966 A. None that I can recall, Mr. Wooden.

Q. Don't you recall the State of Illinois asking for f. o. b. mill prices in 1933?

A. Now that you refresh my memory, I do.

Q. And you declined to make a bid on that basis to them?

A. No; we made a basis of some kind, but just the details of it, I do not recall now. We did give them a bid of some kind.

Q. F. o. b. mill?

A. I don't believe it was strictly an f. o. b. mill price; no.

Q. Don't you recall that in April, 1933, you submitted bids to the State of Illinois covering deliveries at numerous, if not all, of the county seats in the State, that were identical with bids submitted by your competitors?

A. That may be.

Q. Do you recall that in 1932, early in 1932, you submitted bids to the State of Illinois that were non-identical with those of competitors?

A. Yes.

Q. How is it that they were identical in one case and non-identical in the other?

A. In 1932, when they were non-identical, and we secured quite a substantial tonnage from the State of Illinois, our company had about went bankrupt; so that in 1933 we decided to try to get more money for our cement, shipping a lesser tonnage, in order to stay in the business. So that in 1933 we just could not quote prices lower than

39967 we found in the territory. We could not exist.

Q. In other words, your prices had to be identical or you could not exist?

A. They hadn't to be identical. They had to be higher than they were the previous year.

Q. Why did they have to be identical?

A. I didn't—

Mr. Zimmerman: The witness has not said that. As a matter of fact, he said to the contrary, that they did not have to be.

Mr. Wooden: He said they were.

Trial Examiner Norwood: Clarify that.

Mr. Zimmerman: We object to that question in the present form—why did they have to be, when the witness just got through saying that they did not have to be.

Trial Examiner Norwood: Objection sustained.

By Mr. Wooden.

Q. Did you not say a few minutes ago that your bids in April, 1933, to the State of Illinois, were identical with those of your competitors?

Mr. Zimmerman: That is objected to as being cross-examination on his own cross-examination. The record shows what he said, that the Marquette Company, according to the witness' testimony, did not make bids
39968 identical. If other persons happened to have identical prices, that was a thing that was not the witness' fault or Marquette's fault.

Mr. Wooden: The witness has just confirmed what the testimony—

Mr. Zimmerman: Oh, no.

By Mr. Wooden:

Q. I do not understand, Mr. Colburn, what the making of an identical or the making of a non-identical price has to do with whether your company was in danger of bankruptcy or had to have more money?

Mr. Zimmerman: I object to the question. Now, I do not mean to be disrespectful, but I do not believe it proper for Counsel to put a question to the witness based on Counsel's understanding. He may ask him if it had anything to do with it, but I do not think it is fair to base it upon Counsel's understanding or lack of understanding.

Mr. Wooden: All right.

By Mr. Wooden:

Q. Will you tell me, Mr. Colburn, what the logical connection is or was between the making of identical prices in 1933 and the making of non-identical prices in 1932, with the financial welfare of your company?

A. In 1932 the prices we made, as I recall just
39969 now, were all considerably lower than our regular going quotations. In 1933 we stuck by our going quotations, that is, our regular quotations. We did not quote lower than our regular quotations, which brought us more money.

Q. Will you tell me again, if you can, what the relationship is between having identical delivered prices with those of your competitors and the financial welfare of your company?

A. I don't know any relationship between having identical prices and the financial welfare of our company. I do not know of any relationship.

Q. All right.

Do you know of any relation between the lack of identity of your prices and those of your competitors and the financial welfare of your company?

A. At what level?

Q. I did not say any level.

A. Well, I must know what level. If our price is high enough we can quote low enough and still make money. If it is too low, we cannot.

Q. I am asking you about identity or lack of identity. Do you think it is necessary that you have identical prices, in order to have your company do well financially?

Mr. Zimmerman: Now, he has answered that question several times.

Trial Examiner Norwood: No, I do not think
39970 so. He may answer it.

A. No.

Q. Has it been your aim and objective in meeting the competition of your competitors to make your destination prices the same as theirs?

A. No, sir.

Q. To what extent would you say your destination prices differed from your competitors?

A. Our destination prices differ to this extent, Mr. Wooden, that in the area around our mill we do not meet competitors' prices. We make them ourselves.

Q. They come in and meet your prices?

A. I can't help that.

Q. Well, I am asking what the fact it. I am not asking you whether you can help it.

A. No. You asked me whether it was necessary
39971 for us to make our delivered prices identical with our competitors.

Q. No.

A. That is what I understood.

Q. I asked you whether it was your aim to do so.

A. Well, it is not our aim to do so.

Q. Is not the result one of a very substantial identity of destination prices between you and your competitors in the area in which you do business?

A. I think that is true.

Q. Taking your dealer business, what percentage of your whole business has been dealer business?

A. Well, Mr. Wooden, I don't know that I can answer that very definitely. I do recall taking a look at one year to see how we were running, and, as I recall that figure, it was somewhere around 60 percent, or better.

Q. What year was that?

A. I don't recall the year.

Q. Your stipulated testimony, page 3, states that during—

Mr. Zimmerman: You mean paragraph 3?

Mr. Wooden: Yes; paragraph 3.

By Mr. Wooden:

Q. During all the time of your connection with the company, by far the greatest part of the entire output has been marketed, year by year, through retail dealers?

A. That is right.

39972 Q. Do you mean to go higher than 60 percent for other years?

A. In some years, I believe so.

Q. How high would you say it has gone?

A. Well, I can't answer that.

Q. Well, as far as you can tell, then, this stipulated testimony, when it says, "by far the greatest part," means 60 percent? That is the highest you can go?

A. It does not mean that.

Q. You cannot give any definite figure?

A. I cannot give any definite figure on that, Mr. Wooden.

Q. And you do not know what year that was?

A. No, sir; I don't recall what year that was, either.

Q. Now, taking your dealer business by itself, is it not a fact that your destination prices are and have been for some years past the same as destination prices of your competitors to the same dealers?

A. Substantially so; I think that is right.

Q. What do you mean by "substantially"?

A. There may be cases where they are not the same.

Q. In what percentage of cases would that be so?

A. That I can't answer you. I can only give you a

general statement. I cannot give you anything definite on it.

Q. Have not such cases included cases where there was a change in price and there was a temporary short time variation in the delivered price?

39973 A. That is possible.

Q. As a matter of fact, it would not be 5 percent of the instances of sales to dealers in a number of years where your destination prices were different from those of your competitors?

A. I will not testify as to any percentage. I don't know.

Q. Do you recall a time when the Alpha Company put in a price at your Cape Girardeau mill?

A. I do not.

Q. Do you remember a time when the Lone Star Company made a very substantial cut in the prices based on Cape Girardeau?

A. No, sir; I do not.

Q. You do not remember any period of time when any mills of any competitors established prices at your Cape Girardeau mill?

A. No, sir.

Q. If such a thing had happened you would have been in a position to know about it?

A. I would have.

Q. Did you read the testimony of Mr. Coogan in this case?

A. I read some of it.

Q. Did you read his testimony about that?

A. I believe I did.

Q. Now, you have a mill at LaSalle, Ill., and you have two competitors' mills there, have you not?

39974 A. Well, there are two towns there, Mr. Wooden. We call them LaSalle. Our mill is really at Oglesby, and there is another mill at Oglesby, and then the third mill at LaSalle proper.

Q. Are those Alpha and Lehigh?

A. Yes, sir.

Mr. Zimmerman: Which is?

The Witness: The Alphia plant is at LaSalle and the Lehigh plant is at Oglesby.

By Mr. Wooden:

Q. Now, you told us how you fixed the prices at your mill at Cape Girardeau. How do you do it there at LaSalle?

A. I didn't know that I told you how we fixed prices at Cape Girardeau.

Q. Well, I meant by that your statement that you fixed a price that controlled, or to which you added the freight.

Mr. Zimmerman: No, sir; he did not even say that. I object to the question.

Trial Examiner Norwood: Let the witness answer.

Mr. Zimmerman: If the Examiner please, I should be permitted to make a statement here without being interrupted by the gavel.

Trial Examiner Norwood: I do not think so. I think it is out of order, unless you are objecting to the question.

39975 Mr. Zimmerman: That is exactly what I am trying to do. Did Your Honor have in mind that I was making a speech?

Trial Examiner Norwood: That is exactly what I thought you were doing.

The objection is overruled.

By Mr. Wooden:

Q. I am referring to your testimony about the price at Cape Girardeau and the way you added the freight from there to get the destination price.

Mr. Zimmerman: I object to that question as being absolutely not based upon the witness' testimony. He did not testify that they made the price at Cape Girardeau and then added the freight to it, and I object to it.

Trial Examiner Norwood. Objection overruled.

By Mr. Wooden:

Q. What is the fact regarding that, Mr. Colburn?

Mr. Zimmerman: I object to that question as having no sense in it at all. "What is the fact regarding that" does not mean anything.

Trial Examiner Norwood: Overruled.

A. Would you state a question that I could answer, Mr. Wooden?

By Mr. Wooden:

Q. All right. I will try.

39976 Is it not a fact that at Cape Girardeau you have adopted a constant mill net to which you add the delivered freight to get the destination prices in territory other than in your territory?

A. I will answer that "Yes."

Q. That is what I understood before.

Now, how do you do it in LaSalle, where you have two competitors?

A. We do it the same way.

Q. Do you have the same mill net at LaSalle as the other mills there?

A. We do not.

Q. Do you mean to say that you have had, at the same time, a different constant at LaSalle than the other mills there?

A. Not than the other mills there, but different from our Cape Girardeau mill.

Q. Oh, yes, you can forget about the Cape Girardeau mill now.

A. All right.

Q. I am talking about your LaSalle mill.

A. All right.

Q. Then, what is the answer?

A. No, I do not know what the other two mills do, but I know what our constant is, and the net to which we add, and if we run into somebody, either one of them, 39977 holding a lesser one, using a lesser constant for the delivered price, we would have to reduce ours accordingly.

Q. As a matter of fact, you have known that your constant mill net at LaSalle is the same as the constant at the other mills at LaSalle; have you not?

A. We do until there is a change.

Q. Yes.

A. We assume it until there is a change.

Q. In other words, at Cape Girardeau you were more able to make a price there without consideration of other mills than you were at LaSalle?

A. Easier to do it; yes, sir.

Q. During the N.R.A. Code, did you use, in making bids to the United States Government, what was known as a control clause, whereby you would quote a destination cost and permit the Government to deduct the lowest land-grant rate or special rate in order to get a figure at the mill?

A. I think we did that several times, Mr. Wooder, during the Code days.

Q. Did you consider that such a quotation was the equivalent of bidding an f.o.b. mill quotation?

A. Yes; I think I did.

Q. Then, were such types of bids, containing the control clause, included among statements in your stipulated testimony about bidding f.o.b. mill?

39978 A. But we showed exceptions to that general statement in that stipulation.

Q. My question is as to destination cost bids, with the control clause. Were they included in your stipulated testimony, where you said that you bid f.o.b. mill to the Government?

A. No, sir; they were not.

Q. Why were they excluded if you thought they were f.o.b. mill bids?

A. Because what I thought and what the Government thought were two different things.

Q. I meant that you said in your testimony you thought.

A. I said it was what I thought; yes; and I am stating the other one as what was accepted by others than myself as the mill price.

Q. Is it your testimony that during the N.R.A. Code period, you sometimes used the control clause where it might have been used, and sometimes you did not use it where it might have ben used.

A. That is right.

Q. Now, your stipulated testimony, paragraph 3, is to the effect that Marquette's policy had been to sell the Government as requested f.o.b. mill, f.o.b. mill or otherwise, at all times up to the filing of the complaint herein.

A. Yes.

Q. Do you say, when you quoted with the control

39979 clause, that you were then quoting f.o.b. mill?

A. No.

Q. In other words, it was not an invariable policy of yours, then, to quote f.o.b. mill?

The Witness: Mr. Wooden, possibly—

Trial Examiner Norwood: Objection overruled.

The Witness: I can clarify that very easily.

During the Code days, the only price that we

39980 could quote the Government or anybody else was the price that was on file. We had on file a mill price for quoting to the United States Government when a proposal came out that would take that filed mill price, and to it add the lowest land-grant rate or special rate

that we could find to determine the cost of the cement at destination to the Government. If that computed cost was less than the filed price, the filed destination cost price, we then quoted our mill price, but, where we found that our mill price, plus the lowest freight, would be higher than the filed delivered price, then we used the filed delivered price.

Does that clarify it?

Mr. Wooden: I think so.

By Mr. Wooden:

Q. You did not consider that the control clause had any effect upon the ability of the Government to get the benefit of the land-grant rate?

A. It would depend.

Q. On what?

A. On whether our mill price, plus the freight, made a lower price than the destination price filed, with the control clause.

Q. In other words, in some cases your use of the control clause may have operated not to give the Gov-
39981 ernment the benefit of the land-grate rate?

A. In our case it always gave the Government a better price than the one we had filed f.o.b. mill. If we used the control clause, the Government got a better price from us at the mill than it got by using our filed price.

Q. Were there not some cases where you shipped with the control clause applying, and the land-grant rate turned out to be lower than the one you estimated it would be?

A. I don't recall any.

Q. Do you recall any where it turned out to be higher?

A. I don't recall that, either.

Q. You do not recall that land-grant rates were sometimes different than the ones which you estimated?

A. That is right.

Q. You mean you do not recall?

A. I do recall that they were somewhat different at times; yes, sir.

Q. Sometimes higher and sometimes lower.

A. That is right.

Q. Well, if it turned out to be lower you got the benefit of that, did you not?

A. We did not if we quoted a mill f.o.b. price. The Government got the benefit of it.

Q. I mean if the destination cost price—

A. Well, "if," but I don't recall that it ever
39982 happened, because the Government always had these rates before it made the award. It did not change after the award was made; the land-grant rates did not change after awards were made.

Q. Have you followed the testimony in this case?

A. Not all of it; no, sir. I am quoting our own experiences, Mr. Wooden.

Q. Have you not learned in the course of your business that it is only at the time of settlement that even the Government sometimes knows what the land grant is?

A. No, sir; I have never run into that.

Q. Now, in regard to your policy as to the classes of trade that you sell direct and the classes that you sell through dealers, will you point out any differences that you know of between your policy and that of your competitors?

A. I don't know as there are any differences, because our policy was based on other companies' policies that were circulated in the field. I cannot quote you any differences.

Q. Are you referring to policies that your competitors circulated in the field in 1935?

A. I believe it was about that time.

Q. Did you send out notices to your trade in line with those notices that competitors sent out?

A. Yes, sir; we did.

Q. What particular competitor's or competitors' announcements did you follow?

39983 A. I could not answer you at this time, Mr. Wooden. I don't know.

Q. Did you, or anyone from the Marquette Company, attend meetings in the winter and spring of 1935, at which the subject of dealers' trade direct sale was discussed with representatives of dealers?

A. We did not.

Q. Did you attend any meeting where that was being discussed with representatives of competitors?

A. We did not.

Q. I understand you sent out an announcement to your trade on that subject in 1935.

A. On our dealer policy; yes, sir.

Q. Only one announcement?

A. Only one that I can recall at this time.

Q. Can you fix the date of it?

A. No, I cannot.

Q. Will you produce a copy of it?

A. I will refer you to our counsel on that.

Q. So far as you are concerned, will you undertake to do it, subject to consent of counsel?

A. No, sir; I will not agree to produce anything, nor I will not undertake to do anything, except under counsel's direction.

39984 Mr. Zimmerman: When you have finished with your cross-examination of the witness I will be glad to discuss it.

Mr. Wooden: All right.

Mr. Zimmerman: I do not want to interrupt you now to have this discussion.

By Mr. Wooden:

Q. Mr. Colburn, referring to paragraph 11 of your stipulated testimony, that has to do with the discontinuance of your statistical reports to the Institute?

A. Yes.

Q. You said there that your executives concluded that it was a better policy to refuse such statistical information to the Bureau of Mines, because, by subtraction, the amount of your shipments might be obtained.

A. That is right.

Q. What business reasons were there for your not wanting the amount of your shipments known to your competitors?

A. Because it is just none of their business.

Q. Well, you did it—

A. Any more than—

Q. You did it for a while.

A. Correct. We had to do it for a while.

Q. You did not have to do it as long as you did it, though.

A. That is true.

39985 Q. Well, I want to know what business reasons, strictly business reasons to you as a business man, there were for reporting it, and what business reasons there were that led you to discontinuing it?

A. Well, the thing came in, Mr. Wooden, through the Code in the cement industry. We had no objection to giving our figures on shipments and production, if they were not reported back to our competitors, so that they would

know what our production figures were or what our shipment figures were, so—if you will pardon me, I will try to finish my statement—we did not figure that that was any of their business. We figured that the less competitors knew about what we were doing, the better we would be off. So we just quit it.

Q. You had the advantage during that period of knowing what they were doing?

A. We found that we could make no money trying to run our business like other companies ran theirs.

Q. You did not have to run it like theirs.

A. I know, but it is likely to mislead you. I don't want it. We don't want any of their figures. We want to run our own company in our own way.

Q. You say there was no advantage to you in knowing what the shipments of your competitors were?

A. None whatever, individually.

Q. What disadvantage was it to you in having
39986 your shipments known to your competitors?

A. We just figured that they would start jumping at some conclusions, and, maybe, get as good as we were, and we didn't want that, either.

Q. What kind of conclusions?

A. Lord knows what kind they might jump at. I don't know.

Q. Do you mean you think they might think you were doing too much business?

A. I don't know what they might think.

Q. Did you have any experience, during the time that you were reporting it, along those lines?

A. No.

Q. Ever have any comment from any competitors about it?

A. No.

Q. About the size of your shipments?

A. No.

Q. Did you know before the Code, or at the time the Code was under discussion, that the Marquette Company was accused of having enlarged the volume of its business by price cutting?

A. That might be true.

Q. Well, did you know that at the time?

A. No, sir; at the time I didn't know it.

Q. When you spoke about conclusions that they might

draw, did you not mean that they might draw the conclusion that because your shipments were disproportionately large, they would charge you with price cutting?

39987

A. No, I was not so much worried about that. It was a fact that they might go and make some prices to reduce that tonnage. I didn't care what they thought about it.

Q. Tha was, then, a business objection, as you saw it?

A. Right.

Q. And the possibility of an increase in that tonnage might lead to price cutting on their part?

A. It might not lead to price cutting. It might lead to a general price reduction. I don't know what it might lead to.

Q. What is your distinction between a "general price reduction" and "price cutting"?

A. Well, I can only speak for our own company, Mr. Wooden. A general price reduction is on open quotation, and if you use the term "price cutting," it is a special price.

Q. You mean a secret price?

A. A secret price—a price between the buyer and seller only.

Q. Well, a secret cut in a destination price will amount, will it not, to a secret cut in some mills' constant mill net?

A. Possibly would.

Q. Would it not necessarily mean that?

A. It would depend on who was quoting the price and what town it was at. If it happened to be a town near our mill, for instance, and we made a special price, and we reduced our mill net—

39988

Q. Yes.

A. —our constant mill net. That is what the term is.

Q. And if you made a secret cut in territory or at a destination where the price reflected some other mill's constant mill net, you would be, in effect, cutting that mill's constant mill net, would you not?

A. Not if we sold the cement and they did not.

Q. Well, of course; but if they had to meet it.

A. Well, they would not know about it. We do not make a special price that way. We sell them or we do not.

Q. Is it your testimony that secret price cuts can be kept secret?

A. I don't care whether they are kept secret or not, after I get the order.

Trial Examiner Norwood: What is the usual result? Do they keep them secret?

The Witness: Not always, Mr. Norwood. They don't always keep them secret. They sometimes tell about it afterwards.

By Mr. Wooden:

Q. When you talk about price cutting, you mean destination prices that are less than the lowest combination of some constant mill net, plus rail freight, don't you?

A. Well, yes. That is right.

39989 Q. What was the nature of your duties with the company in 1930? Were you on this special—

A. Yes, in 1930 I was on this special work. I got back to the office in 1929.

Q. You got back from LaSalle?

A. From LaSalle, from building this mill. I was down there in the winter of 1928-1929. I was made manager of a service bureau at that time. I was given a little title. In 1930 I spent much of the year trying to build a home and develop an estate for the president of the company, in addition to trying to sell some cement at the same time.

Q. How did you know, of your own knowledge, that the Marquette Company opposed the so-called Lehigh plan of dealers' policies in 1930?

A. Because I was right in the middle of those discussions.

Q. You mean among the officials of your company?

A. Yes, sir.

Q. Your company has sold regularly, has it not, up through Wisconsin and Upper Michigan?

A. Not Upper Michigan; no, sir.

Q. Wisconsin?

A. Wisconsin, part of it—not all over the State.

Q. How far in Wisconsin?

A. Well, about half of the State of Wisconsin.

Q. Do you go as far as Milwaukee?

39990 A. Oh, yes.

Q. Manitowoc?

A. We don't sell anything in Manitowoc. We used to.

Q. Green Bay?

A. Green Bay a little—very little.

Q. You competed, did you not, in that Wisconsin territory with the Aetna Company?

A. A little bit.

Q. No, when Mr. Johnson, president of the Aetna Company, invited you to that meeting in December, 1935, did he indicate to you what it was about?

A. No; except that he would like to have me drop in.

Q. You made no inquiry as to what it was about?

A. No.

Q. Where were those warehouses that you heard Mr. Johnson talking about to Mr. Cree and Mr. Lingeman?

A. I couldn't name you the towns, Mr. Wooden. All that I can recall is that it was in Upper Michigan.

Q. Was there not one in Green Bay, too?

A. I didn't hear Green Bay mentioned.

Q. Did you not know that they had a warehouse in Green Bay?

A. I knew they did not have a warehouse in Green Bay.

Q. Never?

A. No. Not today. They have a jobber up there who has a warehouse, but not Aetna.

39991 Q. Well, that jobber had a warehouse, did he not, at different times?

A. Well, he might have had at that time.

Q. How many others attended this meeting, where you recall Johnson, Cree, and Lingeman?

A. I have not the least idea.

Q. You do not know whether there was a dozen or twenty?

A. No, sir; there might have been a hundred there. I couldn't tell you.

Q. You do remember that they were representatives of cement companies?

A. I couldn't even tell you that, today.

Q. Well, your stipulated testimony says that you recall that others were known to you, and were in the cement business.

A. Possibly true. This took place during the Portland Cement Association meeting, when there were probably 150 cement men in this hotel, and I question very much whether there was anybody in there who were not cement men.

Q. As I understand it, you were not there when the meeting began?

A. No, sir; I was not.

Q. And you were not there when it ended?

A. No, sir; I was not.

Q. Do I understand that the only thing you heard was Mr. Johnson talking to Cree and Lingeman about the warehouses?

39992 A. Raising cain about the cost of the warehouses, and it was costing them a lot of money. That was not any of my business.

Q. That is all you can recall?

A. That is all I recall; yes, sir.

Q. Was this a regular bedroom in which the meeting was held, or where was it?

A. I couldn't even tell you that, now.

Q. It might have been a conference room?

A. It might have been a dressing room, for all I could tell you.

Q. Did anyone else say anything while you were there, other than Mr. Johnson?

A. I don't recall of anybody saying a thing outside of Mr. Johnson, because I was in there just a very few minutes. I had other things to do.

Q. How many minutes?

A. Let's not try to guess at how many minutes.

Trial Examiner Norwood: Just answer the question.

The Witness: I can't answer it.

Trial Examiner Norwood: State whether you can or cannot.

The Witness: I cannot.

By Mr. Wooden:

Q. But you must recognize that the words "very few" do not mean very much. A half an hour might mean a few minutes.

39993 A. That is your interpretation.

Q. Now, I would like you to clarify it.

A. A few minutes to me mean a few minutes.

Q. Well, how many?

A. Well, I would say at the very outside five minutes.

Q. All right. That is all I want to know.

Your stipulated testimony, paragraph 21, states that from the beginning of 1933 up to the time of filing the complaint herein—and then it goes on to describe the policy of Marquette in determining its prices. You do not mean to say that during the N. R. A. period, and during the Trade Practice Committee period following the Code, that you followed the policy there stated—stated in paragraph 21?

Mr. Zimmerman: And you might let him read it.

Trial Examiner Norwood: Yes.

Mr. Wooden: Yes (handing the document to the witness).

A. Yes, I do.

By Mr. Wooden:

Q. You also testified, however, that during the Code period, the N. R. A. Code period, you met the filed destination prices of competitors?

A. That is right.

Mr. Zimmerman: Excuse me. That was not his testimony, exactly, and I object to the question that he so
39994 stated. The testimony was—

Trial Examiner Norwood: Don't tell him what the testimony was.

Mr. Zimmerman: I have a right to state my recollection in connection with my objection, of what the witness said.

Trial Examiner Norwood: I do not think the witness needs any help here.

Mr. Zimmerman: Well, he is not getting any help from me. I am stating an objection, sir, and I have a right to state what my recollection of the testimony is.

Trial Examiner Norwood: I think not, under the circumstances.

Mr. Zimmerman: What are the peculiar circumstances? If Counsel misassumes the record, then I have a right to correct it, I think.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Zimmerman: That is an assumption on the part of Counsel as to what the record shows. It is an attempt to cross-examine upon the cross-examination. He did now say to him "You also testified thus and so," and I maintain the witness did not say that. Now, that is something that is not correct.

Trial Examiner Norwood: Well, let the witness
39995 answer. He is the only one who can properly answer whether he did or not. I took the question to elicit from the witness an answer as to whether or not he had testified that way. Now, he has a right to ask him that if he did answer that way or not.

A. I did testify that we met some filed prices, and that we did also file some of our own.

By Mr. Wooden:

Q. Which your competitors met?

A. I presume that that is true.

Q. During that period you had advance notice of t price filed by your competitors?

A. Yes, we did.

Q. They had advance notice of the prices filed by you

A. That is right.

Q. How do you reconcile—

Mr. Zimmerman: Excuse me, just a moment, for inter rupting; but I think the question is not as clear as it ough to be. I do not believe that Mr. Wooden means that either Marquette or its competitors had advance notice of what prices would be filed.

Mr. Wooden: No.

The Witness: No, no.

Mr. Zimmerman: Merely that they had advance notice— they had notice of prices as they were filed.

39996 The Witness: That is right.

Mr. Zimmerman: And as they were filed.

Mr. Wooden: That is right, before they became effective; that is right.

Trial Examiner Norwood: Did you complete that ques tion?

By Mr. Wooden:

Q. You had such notice and they had such notice before the prices actually became effective?

A. That is right, Mr. Wooden.

Q. How do you reconcile your filing of such prices and their getting such information, and their filing such prices and your getting such information with the statement in paragraph 21 of your stipulated testimony that from the beginning of 1933 up to the time of filing the complaint herein, was Marquette's policy to maintain independence in its pricing and marketing of its product and to refrain from collaboration with its competitors?

A. We did not have to collaborate with any competitors to file a price. That was our own act. We went through exactly the same procedure but had to file the price and let everybody know in advance what is was.

Q. Well, you knew your competitors were going to get yours?

A. Certainly; but that had no effect on what the price was going to be.

39997 Q: You do not consider that any collaboration at all?

A. None whatever.

Q. Now, with reference to paragraph 23 of your stipulated testimony, you state there that you made announcements increasing your prices in 1932 and 1933 only after Marquette had sold all of the cement it could possibly manufacture and deliver during those two years.

Do you mean to say that you had sold all your dealer trade in advance for such a period of time?

A. I do not.

Q. In other words, you did not have dealer commitments for a great part of your output in advance?

A. A very small part of it, in fact.

Q. Did your mill or mills operate to capacity in 1932?

A. 1932; yes, sir.

Q. Was that on the strength of the Illinois Highway business?

A. Yes, to some extent.

Q. Did you operate to capacity in 1933?

A. No, sir; we did not.

Q. How much? What percent?

A. Well, I would guess about 70 to 75 percent.

Q. Well, how can you say, then, that you have sold all of the cement you could possibly manufacture in 1933 at the time you made a price increase?

A. For the very simple reason that we did not
39998 take on any tonnage until along about the first of July, 1933. Our sales—

Q. Did you—

Mr. Zimmerman: Wait a minute. Let the witness finish his answer.

Trial Examiner Norwood: Wait a minute.

The Witness: I would like to get this, if I could.

Trial Examiner Norwood: Go ahead.

A. Our sales in 1933 on the first of June were about a million and a half barrels; on the end of July they were 3,760,000 barrels. Our sales had all come in there in the month of June, so then we had to open the plant up, and we did open it up, and run as full as we could the rest of the year.

By Mr. Wooden:

Q. That is what I was going to ask.

Mr. Zimmerman: Let him finish, please.

A. The rest of the year we ran it as full as we could.

Mr. Zimmerman: Wait a minute.

Did the witness finish his answer?

Trial Examiner Norwood: I think so.

Mr. Wooden: I think he has.

Mr. Zimmerman: It is not a question whether anybody thinks he has or not. The witness knows and the witness ought to say whether he has or not.

Trial Examiner Norwood: He has stopped talking.

39999 The Witness: I am finished; yes, sir.

Trial Examiner Norwood: He has finished.

Go ahead.

By Mr. Wooden:

Q. Was your running to capacity after July also the result of large business from the Illinois Highway Commission?

A. It was as a direct result from the Illinois Highway—see, there was two million barrels, which more than doubled our sales there in one month.

Q. Referring to this incident, described in paragraph 23 of your stipulated testimony of an abortive price increase in the spring of 1937, do you remember that?

A. The spring of 1937?

Q. Yes.

A. Yes, sir. I do recall that.

Q. What was the amount of that proposed increase?

A. Now, we are talking about—

Q. The amount to be increased on or about May 8, 1937.

A. We are talking about where we have the two plants, Mr. Wooden; there was an increase at one plant, and another plant we attempted to put one in, LaSalle, I presume you are talking about—that is May. Is that right?

Q. Yes.

A. Yes, that was LaSalle.

Q. Then, there was another one about that time 40000 at Cape Girardeau, was there?

A. Previous to that, I believe.

Q. In March?

A. Yes, I think so. Well, as I recall, we were going to try to increase our net, our constant mill net about 15 cents, which would mean that our destination costs would vary; in other words, make an increase of 2 to 15 cents.

Q. That was the same amount that you had put in prior to that time, increase at Cape Girardeau?

A. I believe so.
Q. Did the Cape Girardeau increase become effective?
A. Yes, it did.
Q. That stuck?
A. That stuck; yes, sir.
Q. Wasn't the effect of that Cape Girardeau increase of 15 cents in March, 1937, to make Cape Girardeau a mill point whose mill net was no longer constant?
A. No. I differ with you on that. It was not the intent, and I do not believe it is the effect.
Q. Do you say that Cape Girardeau continued to have a constant mill net after the increase of March, 1937?
A. Yes, sir.
Q. Do you say that it did not have the effect of making Cape Girardeau inactive so far as figuring delivered prices was concerned?
40001 A. Very nearly inactive. I do not believe entirely so, Mr. Wooden.
Q. It did have that effect?
A. It did reduce the area considerably.
Q. That was restored, did it not, to a status that it had occupied some years before?
A. No.
Q. Isn't it a fact that prior to 1930 Cape Girardeau did not have a constant mill net?
A. Some time along there. I do not know just which date—that is right. I do not know just which date. I will have to take your word that it was 1930. But, of course, our thinking at that time, Mr. Wooden, was that other mills would increase their constant mill net like we did, but they did not, and we stuck by our guns.
Q. At that time?
A. Yes.
Q. What time are you speaking of?
A. Along in that early 1937.
Q. March, you mean?
A. March or April or any time in early 1937.
Q. Well, the March increase stuck?
A. Yes, that did stick, but we were hoping other competitors would feel the way we did about it, therefore the area that that constant mill net controlled would still
40002 be there, we still control some parts. As long as we can get $1.90 at Cape Girardeau we are going to have it there, too.

Q. How long did that stay at $1.90?

A. It is still there, at the time of the complaint.

40003 Q. Mr. Colburn, can you cite any specific instances prior to July, 1937, where the Marquette Company bid f.o.b. mill to the Government without knowing the destination to which the cement was to be shipped?

A. I do not believe I can, Mr. Wooden.

Q. In making quotations f.o.b. mill to the Government prior to July, 1937, did you figure the destination price and then deduct the freight in order to get the f.o.b. mill price?

A. No, sir.

Q. Why did you not quote the State of Illinois on an f.o.b. mill basis in April, 1933, as they had requested?

A. Well, principally because we did not want to.

Q. Well, of course, my question is why you did not want to.

A. We did not think it was good business for us to do so.

Q. Why didn't you think it was a good practice to do so?

40004 A. We had no way of meeting competition of other mills who might do the same thing.

Q. You mean you had no way on an f.o.b. mill basis of making your destination prices the same as your competitors?

A. I do not mean that.

Q. Well, if that is not what you mean, what do you mean?

A. I mean that we would not be able to make our mill price low enough in order to meet the competition at more distant points from our mill.

Q. By meeting the competition, you mean making the delivered price as low as the lowest?

A. Well, that is right.

Q. And not making it lower at any point than the lowest?

A. We tried that in 1932, making it lower, and it did not work.

Q. Is that why you did not try it again in 1933?

A. We lost over a million dollars in 1932 and we had no money to lose in 1933.

Q. Is that the only reason you did not quote f.o.b. mill in 1933?

A. Because it would cost us money and we could not afford it.

Q. I am asking you if one reason you did not quote f.o.b. mill in 1933 was because it enabled you to make your delivered prices as low as any of your competitors and enabled them to make their prices delivered as low as yours?

40005 A. I do not understand that.

Trial Examiner Norwood: Read that question.

(Question read.)

A. I cannot answer that.

By Mr. Wooden:

Q. You cannot answer it?

A. No, I cannot answer that question.

Q. Well, it had that effect, didn't it?

A. I do not follow this at all, Mr. Wooden. I am at sea.

Q. Well, when you quoted delivered in April, 1933, to the State of Illinois, your prices delivered were the same as those of your competitors, weren't they?

A. Substantially so.

Q. Weren't they identical, practically, every point in the State?

A. I will say substantially so.

Q. What was the extent of your participation in the discussions that took place in the industry, before the N.R.A. Code was adopted and in connection with the formulation of an N.R.A. Code?

A. I attended practically every meeting, industry meeting, in connection with the formulation of the Code as a representative of Mr. Dickinson in representing our company. I do not know as I took part in very many of the discussions with the exception of objecting to hav-

40006 ing so many things covered by the Code.

Q. Wherever you had objections, did you state them?

A. Oh, yes, sir.

Q. And where you had no objections, you did not say anything?

A. Well, Mr. Wooden, our thoughts at that time were boiled down to this, that we thought the Code should only cover wages and hours of employment, and everything else should be left out of it.

Q. Well, where you did not object did you say anything in favor of what was—

A. No, sir.

Q. —put into the Code?

A. No, sir.

Q. In other words, whatever you said was only in opposition?

A. That is right, sir.

Q. Did you oppose any of the declarations in Article IX of the Code, which I show you, as a part of an exhibit, Commission's Exhibit 560?

A. We surely did.

Q. Which one?

A. All of it.

Q. All of it?

A. Yes, sir.

Q. In other words, that was your general ground of opposition to anything except wages and hours?

40007 A. Yes, sir.

Q. But after the Code was adopted you fell in line with what the Code called for?

A. We had no choice.

Q. What has been the practice of the Marquette Company with regard to the matter of diversions of cement in transit?

A. We have been opposed to it.

Q. Continuously?

A. As far as I can remember, Mr. Wooden; yes, sir.

Q. You were in principle agreed with that provision of the N.R.A. Code that declared diversions under some circumstances to be unfair trade practice?

A. In principle; yes, sir. We did not think it should be covered by the Code, however.

Q. Does your company use a non-diversion stamp on bills of lading?

A. Now, we are talking of 1937, aren't we? I would say yes.

Q. Did you use the stamp, such as is set forth in Commission's Exhibit 584-G?

A. I would say similar to that, Mr. Wooden. It may not be the exact wording.

Q. You received this communication?

A. Oh, yes, sir.

Q. From Mr. Browder?

40008 A. Yes, sir.

Q. In view of that testimony you have just given, how do you reconcile the statement in your stipulated testimony, paragraph 25, that at no time since 1932 had the Marquette Company directly or indirectly collaborated or cooperated with any other manufacturer with regard to any pricing or marketing practices relating to the price of cement?

A. We did not collaborate with anybody.

Q. You did, however, you testified, oppose diversions, and used the stamp which I called to your attention?

Mr. Zimmerman: Just a moment. This is argumentative, clearly, and I object to it. The witness has stated that they always opposed diversions back as far as he could remember. Now, this is merely a continuation. We still object to it.

Trial Examiner Norwood: Well, he may get his attitude.

Mr. Zimmerman: The form of the question is argumentative.

Trial Examiner Norwood: It goes to his understanding of what constitutes collaboration and agreement, and so forth. He may ask him that.

By Mr. Wooden:

Q. Did you state, Mr. Colburn, that the Marquette Company had always refused to allow diversion of shipments?

40009 A. As far as I can remember; yes, sir.

Q. Prior to July, 1937, was the delivered price at Memphis based on the constant mill net at Cape Girardeau?

A. I don't know.

Q. Was it based on Birmingham at some time in that period?

A. That I don't know.

Q. You don't know what it was based on?

A. No, sir.

Q. At any time?

A. Not at any particular time; no, sir.

Q. You do not even know now?

A. No; I don't know now.

Q. You did not know on Saturday?

A. I did not know on Saturday.

Q. Besides this instance in May, 1937, did the Marquette ever lead in a price advance in La Salle?

A. Yes, sir.

Q. When?

A. We led in a price advance in 1932.

Q. All right. Any other time?

A. Offhand, I don't recall, Mr. Wooden. I am sure there were other times, but I cannot give you the instances.

Q. As a matter of fact, prior to 1932 Marquette Company was a follower of price changes made by other mills rather than an initiator of changes on its own behalf?

40010 A. No, sir.

Q. I am referring to changes in your constant mill net.

A. At which mill, Mr. Wooden?

Q. At Cape Girardeau.

A. At Cape Girardeau, we have always made our own mill net at Cape Girardeau, up to 1930.

Q. Were they constant?

A. Previous to 1930, they were not.

Q. As a matter of fact, you did not establish the first constant mill net at Cape Girardeau; did you?

A. We did.

Q. You did?

A. Yes; we did.

Q. It became what is known as a basing-point mill?

A. That is what somebody called it, a basing-point mill. That is the terminology that they used.

Q. You say you became a basing-point mill by action of your own that did not involve similar action by any other mill?

A. I do.

Q. You read Mr. Coogan's testimony about that?

40011 A. I did.

Q. With regard to that last question and answer, is it not a fact that you had made some prices which reflected a mill net at Cape Girardeau which was the equivalent of a price established for Cape Girardeau by the Alpha Company?

A. Well, we established a price ourselves. We made those prices, not Alpha.

Q. You had made some previous?

A. That is right.

Q. Equivalent to that Cape Girardeau basis.

A. That is right.

Q. But you had not made it on all of your business?

A. Possibly not.

Q. In other words, you made it on some rather important portion.

A. Yes, quite a number of them.

Mr. Wooden: Your Honor, in closing the cross-examination of the witness, I desire to move to strike such portions of his testimony as were evolved here without being responsive to questions on the subject of the profitableness of the operations and the relation of the prices to costs and profits.

Mr. Zimmerman: Does Your Honor desire to hear me on that?

Trial Examiner Norwood: I do not see how I can
40012 rule on that until I study the record.

Mr. Zimmerman: I think if the objections had been made simultaneously with anything that was to be objected to, it would have been much more simple. I think, to trim up the statements of the witness to an unnatural extent, to prune them off so that they would more nearly conform to Counsel's desire, is hardly permissible as a general rule. The witness stated those things which seemed to me to indicate what the condition of mind was at the time, when, based upon that condition of mind, they took those certain actions.

I think that is all I can say at this time.

Trial Examiner Norwood: I deny the motion, with the qualification that the statements referred to will not be taken as proving what the costs and profits were.

Mr. Zimmerman: Right. I do not think Mr. Wooden or I had that in mind. We would not attempt to so construe it.

Mr. Wooden: I had in mind particularly the witness' statement about losing a million dollars in 1932. There is no way of going behind that.

40013 *Direct Examination by Mr. Zimmerman.*

Q. I would like to ask you, Mr. Colburn, if the price bid to the State of Illinois in response to the invitations in the spring of 1933 was the price at which Marquette sold

to the State of Illinois some 2 million barrels in June of that year?

A. Well, I would say it was not.

Q. The price that was ultimately made was one that was arrived at through subsequent negotiations; that is, negotiations subsequent to the response to the invitation in the spring?

A. That is right, sir.

Q. And was that a price which, so far as you know was more or less—that is, higher or lower than any bid made by any competitor of Marquette?

A. It was lower than any bid made by any cement company at that letting.

40014 Q. Who in the organization had most to do with the Government bids?

A. I had. I had all the way through.

40018 P. G. DAWSON, was thereupon called as a witness for the Respondents, and, having been first duly sworn, testified as follows:

40019 Trial Examiner Norwood: The stipulations as follows:

It is hereby stipulated that if P. G. Dawson, vice president and treasurer of the Medusa Portland Cement Company (hereinafter referred to as "Medusa" or as the "Company"), were to testify on his direct examination with respect to the matters hereinafter indicated, he would give as his testimony with respect to those matters the statements hereinafter set forth.

40021 (1) Since 1936 I have been vice-president and treasurer of the Medusa Portland Cement Company. I first became associated with this company in September, 1929, as secretary of the company, which position I held until December, 1936, when I became vice-president and treasurer.

(2) I first became associated with the manufacture and sale of Portland cement in 1913 when I started as an employee of the Newaygo Portland Cement Company. I remained with this company until 1923, successively holding the positions of bookkeeper and finally accountant. In 1923 I became secretary of the Manitowoc Cement Company,

which position I held until 1936. I became associated with the Medusa Company in 1929. When I was with the Manitowoc Company I had charge of finance and credit and worked closely with the sales department.

(3) As vice-president of the Medusa Company I assist in making decisions from a standpoint of sales policy. In the absence of J. B. John, president of the company, I am in charge of the operation of the company. J. B. John devotes a portion of his time to our sales and operating departments and I work with him on such matters. I am informed about major matters of policy as they are being decided, and take part in the discussion and final decision.

40022 (4) I am a member of the board of directors of the Medusa Company and also am a director of a few companies which are subsidiaries of the Medusa Company, including the Cement Transit Company, a transportation company wholly owned by Medusa, and the Manitowoc Cement Company, a cement producing company wholly owned by Medusa, and Medusa Products Company of Canada, Ltd., which is a wholly owned subsidiary of Medusa. I am not a member of the board of directors of any other cement producing company.

(5) The records of the Medusa Company and its predecessors show that the Sandusky Portland Cement Company of West Virginia was organized originally in 1892 and continued as a selling company until 1900. In 1900 the Sandusky Portland Cement Company of Ohio succeeded the Sandusky Portland Cement Company of West Virginia. In 1916 the Sandusky Portland Cement Company of Ohio was succeeded by a new and distinct corporation named the Sandusky Cement Company, also incorporated in Ohio. In 1928 the name Sandusky Cement Company was changed to the Medusa Portland Cement Company.

(6) The Medusa Company is not affiliated in any way with any cement manufacturing company other than the Manitowoc Portland Cement Company. None of the officers of the Medusa Company is an officer of any other cement producing company. With the exception of J. B. John, none of the directors of the Medusa Company is a director of any other cement producing company.

40023 (7) J. B. John is a director of the Medusa Company and also a director of the Petoskey Portland

Cement Company. J. B. John was engaged in 1919 to construct Petoskey's cement plant. Following the completion of the plant, Mr. John was retained by that company as vice-president and general manager to supervise the operation of its plant. At a later date J. B. John was elected president of the Petoskey Company and continued in that capacity until January, 1937, at which time he resigned the office of president but was retained as a director of the company. The Petoskey Company was never operated as a part of the Medusa chain of mills. J. B. John resigned as president of the Petoskey Company in order to devote all of his attention to the Medusa Company. J. B. John became affiliated in 1922 with the Sandusky Cement Company. J. B. John had been engaged by the then president, S. B. Newberry, to serve in an advisory capacity in the construction of a new plant at Silica, Ohio. Several months prior to the completion of the Silica plant, Mr. Newberry suddenly died and J. B. John was appointed general manager. Later he was elected to the office of president and general manager, which office he has retained to date.

(8) The records of the company show that the Newaygo Portland Cement Company was organized in 1898 and that in 1911 it was succeeded by a new and distinct 40024 corporation of the same name. J. B. John became general plant superintendent of the Newaygo Portland Cement Company in 1913. In 1916 J. B. John became vice-president and general manager of this company on the death of the former president, Daniel McCool. In 1930, J. B. John was elected president of this company.

(9) In 1923, the Newaygo Portland Cement Company organized the Manitowoc Portland Cement Company and, after having increased its own capital structure by the sale of stock and also the sale of bonds, constructed a plant at Manitowoc for that company. J. B. John was made vice-president and general manager of the Manitowoc Company at the time of its organization and continued in that capacity until 1930 when he was made president of the company. In September, 1929, a consolidation of the Medusa and Newaygo Companies was effected by the exchange of stock, the Medusa Company issuing common and preferred stock in exchange for like stock of the Newaygo Company and as a result of this exchange became

the sole owner of all the shares of the Manitowoc stock and of the Cement Transit Company.

(9) In 1936, the Newaygo Portland Cement Company was dissolved. The Manitowoc Portland Cement Company continues to retain its corporate identity as a Wisconsin corporation all of its stock being held by the Medusa Company having obtained it from the Newaygo Company. The Manitowoc Company is a separate producing company in the State of Wisconsin. The Manitowoc Company is maintained to obtain any local benefits which may arise from the fact that it is a Wisconsin corporation, and is the only cement-producing plant in the State of Wisconsin.

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(10a) The Crescent Portland Cement Company owned and operated the mill at Wampum, Pa. In January, 1929, the Medusa Portland Cement Company purchased through a third party all of the common stock of the Crescent Portland Cement Company, with the exception of about 300 shares. Prior to 1929, the Medusa Company had no interest in or connection with the Crescent Company. In 1935, the remaining outstanding shares of common stock were purchased by the Medusa Company, and in 1936 the Crescent Company was dissolved and title to the assets of this company was transferred to the Medusa Company, the then holder of all outstanding shares of common stock of the Crescent Company.

(11) The main office of the Medusa Company is located in Cleveland, Ohio. It has branch sales offices in York, Pa.; Toledo, Ohio; Pittsburgh, Pa.; Chicago, Ill.; New York, N. Y.; Washington, D. C.; Grand Rapids, Mich.; and Manitowoc, Wis. It has silos and packing plants at Milwaukee, Wis.; Chicago, Illinois; Holland, Mich.; and warehouse storage facilities in Washington, D. C.

(12) The Medusa Company owns and operates six plants which produce standard Portland cement. These mills are located respectively at Manitowoc, Wis.; Dixon, Ill.; Silica, Ohio; Bay Bridge, Ohio; Wampum, Pa.; and York, Pa., which is some 50 miles southwest of the Lehigh Valley area. The Medusa Company also had a plant at Newaygo, Mich., which has not been operated since 1931 and is now in the process of being dismantled, and a plant at Syracuse, Ind., which is completely dismantled.

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40630 (25) The six plants of the Medusa Company produce standard Portland cement. It also manufactures white cement, water-proof gray cement, water-proof white cement, high early strength cement, masonry cement (brick set), cement paints, floor coating, Medusa light (an interior flat wall finish—not an oil paint, a water paint), water-proofing powder, concentrated water-proofing paste.

(26) Our mills could produce in a calendar year the following amounts of standard gray Portland cement:

The plant at York	540,000 barrels
The plant at Wampum	1,350,000 barrels
The plant at Bay Bridge	1,100,000 barrels
The plant at Silica	1,200,000 barrels
The plant at Dixon	1,500,000 barrels
The plant at Manitowoc	1,200,000 barrels
Total	6,890,000 barrels

(27) The capacity which Medusa has at present at our mills was built up to take care of the demand which existed from 1926 to 1929.

(28) Medusa has had the policy of keeping its mills up to date and it usually has some modernization work in progress all the time. Medusa has attempted to make improvements so as to reduce the costs of manufacture. Among the improvements which have been made have been the installation of slurry filters in the wet process plants,
installation of waste heat boilers, special unit pul-
40631 verizers, air separators, and grinding and screening machinery. These and other improvements have been made at considerable cost but were made so as to make the Medusa mills economic to operate and to improve the products which Medusa manufactures.

(29) With the exception of Newaygo mill (not in operation since 1931), all of the mills of the Medusa Company are efficient and economical. This is due to the fact that although some of the mills were built many years ago, the company has expended considerable money on technological and mechanical improvements. For this reason, our mills are now prepared to produce their maximum capacity, if the demand for cement were to require it at any time. The Wampum and the Dixon mills employ the dry process; the others are wet process mills.

It would be an expensive operation to convert these two dry process mills to wet process and the expenditure would not be warranted by any resulting improvement.

(30) Shipments from the various mills of the Medusa Company fluctuate widely from month to month depending on seasonal demands. In the part of the country where the mills of the Medusa Company are located, the winters are severe and shipments in the winter months are very small. From a period beginning about April 1st to April 15th, shipments pick up until they reach a peak in July, August, and September.

(31) Before 1930 it was Medusa's custom to operate its mills constantly, except when a shutdown was
40032 necessary to make major repairs. Medusa attempted to fill its storage facilities by April or May. Under present operating conditions and reduced demand, Medusa operates its mills until it thinks it has a sufficient supply of cement to carry it to the opening of the construction season the following year. In some instances Medusa has shut down a plant in September or October and in other instances a plant will be operated until January or February, depending on the demand during the previous season and Medusa's best estimate of future demand. Medusa attempts to spread employment as far as possible by curtailing operations and extending the operating period. Operation at partial capacity is more expensive than operation at full capacity because to bring the plant up to capacity operation, added personnel and other overhead costs and operations are relatively small. This policy cannot be followed at the York gray plant because that plant has only one kiln. This means that either the plant is operating at full capacity or is not operating at all. The other plants have more kilns so that one or more can be shut down at any given time. The Wampum mill has six kilns; the Bay Bridge mill has eight kilns; the Silica mill has three kilns; the Dixon mill has eight kilns; the Manitowoc mill has three kilns. In order to reduce cost, we have lengthened the kilns at two of our plants.

(32) Large jobs have a pronounced effect on
40033 fluctuation in demand at a given mill. In order to be sure of being able to meet production schedules for immediate delivery Medusa has a large stand-by capacity that is not constantly in use but does constitute a part of overhead cost.

(33) The Milwaukee silo and packing plant was erected by the Manitowoc Portland Cement Company in 1926. It has been operating continuously since 1926, receiving bulk cement from the Manitowoc plant by boat. The water transportation to Milwaukee is furnished by the Cement Transit Company which the Newaygo Company organized as a subsidiary corporation. The Cement Transit Company owns and operates a bulk cement carrier between the Manitowoc mill and the Milwaukee packing plant. Only finished cement is shipped from Manitowoc and no manufacturing operations are performed at the Milwaukee plant. Sales in Milwaukee are made in bulk as well as in packages, delivery is made by rail cars or by trucks, depending on the demand of the trade.

(34) When the silo at Milwaukee was first erected, the Manitowoc Company sold cement from it on the same basis that it had formerly employed in the Milwaukee market. Regardless of whether the cement was shipped to the customer from Manitowoc by rail, or delivered to him from the Milwaukee silo, the same price applied, i. e., the lowest price quoted by any of its competitors in this market.

Although the Manitowoc Company never established 40834 a plant price at its Milwaukee plant after the Medusa Company started to market the cement from the Milwaukee silo, it met the competition of a competitor who did establish such a price at their silo and packing plant in Milwaukee on May 25, 1931. Both Manitowoc and Medusa Companies have always met the lowest prices quoted by any of their competitors in and around Milwaukee.

(35) Several years ago the Medusa Company adopted the practice of permitting dealers to pick up cement at the Milwaukee silo. In such cases, the delivered price at the dealer's warehouse was charged. If a customer ordered cement delivered to his warehouse by a contract carrier, that is, by a trucking company, the Medusa Company prepaid transportation charges. This is the present practice of the Medusa Company. Over the last 12 years, other practices have been followed to meet the competition Medusa found. Medusa found its competitors quoted at their silo a delivered price from which transportation allowances were made to the dealer's warehouse. On May 27, 1931, Medusa met this competition. Medusa found the amount of such transportation allowances changed from time to time.

(36) The Manitowoc Company established a silo and packing plant at Chicago in 1926. This silo was erected in order to obtain the advantages of low rates of water transportation between Manitowoc and Chicago and in order to be in a position to give quick delivery by
40035 truck in order to meet a competitive situation arising out of the truck deliveries to the Chicago market from Buffington, Ind.

(37) When the Chicago silo was first placed in operation, dealers were permitted to pick up cement in their trucks at the silo for delivery in Chicago. Within the switching area of Chicago and Cook County, we also distributed by freight car, if demanded by the trade. This policy was adopted to meet the competition of the Buffington mill.

(38) About 1928, the Petoskey Portland Cement Company constructed a silo and packing plant in Chicago. This is the only other distribution plant of this nature that has been constructed there. Some ten or more other competitors continued to ship into the Chicago market by rail and affected our volume of sales to the extent that we increased our sales force and established a separate sales office to service the City of Chicago, maintaining a second office to take care of the remainder of the Illinois market. The Chicago silo is a warehouse in which the bulk cement is stored. This cement is conveyed to the packing plant, where it is packed and loaded on trucks.

(39) Cement is transported from Manitowoc, Wis., to the Chicago silo in a boat owned by the Cement Transit Company. The Medusa Company pays the Cement Transit Company. This saving in rates lower than the rail rate from Manitowoc to Chicago is more than offset
40036 by the cost in operating a silo in Chicago.

(40) Packaged shipments have not been made to the Milwaukee or Chicago warehouses because of the additional cost of handling cement in this way. Transportation of bulk cement involves no additional labor. It is all done mechanically, whereas shipping in packages involves double handling.

(41) In 1930 Medusa established a warehouse in Cleveland, to which it shipped packaged cement by rail. This cement was distributed by truck from the warehouse for about six or eight months, at which time Medusa discontinued the warehouse and delivered cement from its Bay

Bridge plant about 60 miles from Cleveland by hired trucks to meet the competitive service of Aetna, Lehigh and Huron which shipped cement into Cleveland by water and redistributed by truck. Other cement companies, such as Alpha, Universal-Atlas, Bessemer, Diamond, and Standard which served this market but did not have available water transportation, opened warehouses in Cleveland. Medusa has always been able to ship cement to Cleveland in less than 24 hours, but in order to meet competition both in price and service, Medusa was forced to offer dealers a delivery service equivalent to that of its competitors, namely, delivery to job site in three or four hours. The Cleveland warehouse was discontinued because Medusa found it would be more economical to arrange for truck delivery from Bay Bridge to job site or dealer's
40037 warehouse than to operate the warehouse. At the time Medusa opened the warehouse, there was no trucking concern available with equipment adequate for this undertaking.

(42) Our Cleveland warehouse served Cuyahoga County and allowed dealers to take delivery in their own trucks at the warehouse without any surcharge added.

(43) On April 13, 1931, the Medusa Company established a warehouse at Pittsburgh because it found that the Universal-Atlas Company was allowing Pittsburgh dealers to come to its mill at Universal (9 miles from Pittsburgh) and to truck; and the Green Bag Company was allowing Pittsburgh dealers to come to its plant at Neville Island (8 miles from Pittsburgh) and to truck. Medusa's nearest mill was 45 miles from Pittsburgh and in view of the fact that our competitors were allowing truck deliveries which took only one or two hours to get into Pittsburgh, whereas it required up to 20 hours for Medusa to deliver to the metropolitan area of Pittsburgh from its plant by rail. Medusa rented a warehouse for the purpose of meeting the competition of the other companies which were then serving the Pittsburgh market. The cement was warehoused for customers at no extra charge and loaded on dealers' trucks at this warehouse. Medusa continued to serve the City of Pittsburgh from this warehouse until it found its competitors discontinued this service late in 1931. The warehouse was closed when Medusa found that its competitors had discontinued truck-

ing in and around Pittsburgh. Medusa was glad to
40038 discontinue this warehouse because it was an added expense to Medusa and in 1931 Medusa was curtailing its activities as much as possible so as to economize.

(44) When Medusa determined to abandon the use of the Newaygo mill, Medusa decided it would be advisable to retain in the Michigan market the identity of the Newaygo plant which had been in existence since 1900. Medusa continued to serve western Michigan from the Manitowoc plant and the southeastern section of Michigan from the Silica plant. Medusa rented a warehouse at Holland, Mich., and transported cement to it from Manitowoc by a small boat which could handle packaged cement. This warehouse was opened about 1933 and continued to serve this territory until the spring of 1937, at which time prices in Michigan became so low that Medusa decided to discontinue the warehouse.

(45) Since then, Medusa has shipped cars from Toledo consigned to Medusa at Granville, Mich., on the outskirts of Grand Rapids. There Medusa unloaded direct from cars to trucks for distribution to the trade. This policy was adopted because in 1937 Medusa found from its customers that its competitors were offering blanket or zone prices throughout the Lower Peninsula in Michigan. These prices were so low that Medusa could not afford to meet them and pay the added expense incident to the operation of a warehouse.

(46) Prior to the establishment of this low blanket
40039 or zone price, Medusa was able to transport its cement from Manitowoc to Holland at about the same rate as the rail freight from other producing points to Grand Rapids, the largest cement market in western Michigan. Under this situation, Medusa could afford to operate the warehouse. The blanket price substantially reduced delivered prices in the vicinity of Grand Rapids. Under these reduced prices, the cost of storage and rehandling so reduced Medusa's mill net that it could not economically continue the warehouse service at Holland. While the warehouse was in existence, Medusa permitted dealers to take delivery at the warehouse in their own trucks at the lowest price currently quoted at the destination where their business was located. No allowance was made for transportation. Most sales were made at destination prices for delivery to dealers' warehouses in trucks hired by Medusa.

(47) In January, 1939, Medusa commenced the erection of a silo and packing plant at Holland, Mich., which was completed in June of that year. From this silo Medusa distributed cement manufactured at Manitowoc, and transported it in bulk by the company's vessels from Manitowoc to Holland. This cement is distributed in the western Michigan territory.

(48) Cement manufactured by the mills of the Medusa Portland Cement Company is sold throughout an area which extends from Baltimore, Md., on the east to eastern Iowa and Minnesota on the west and the northern
40040 part of North Carolina on the south. When shipments can be made from one of two or more plants of this company, that mill is chosen which will realize the highest mill net on the shipment. In 90 percent of the cases salesmen are identified with one particular plant. Salesmen of special cements and other products are not so limited. Shipments of the company are conformed generally to sales at points which produce a satisfactory return. In exceptional cases, the company ships beyond such limits in order to achieve a large volume of business or to maintain the good will of the dealer or contractor. The estimated cost of selling in particular markets, as well as the tonnage, is taken into consideration.

(49) In determining the area in which Medusa will normally solicit business the following are taken into consideration: 1, the freight rate; 2, the volume of business available in the territory adjacent to our mill; 3, the mill net we would realize on a sale; 4, the cost of securing the business; 5, the volume of business available in any given distant market; 6, the service Medusa is able to render in comparison with the service from competing companies; and, 7, the long-term or future relationship with purchasers in that market. For this reason Medusa at times ships into territory outside of the area in which it solicits, but it is a territory in which it would not be profitable for it to exert any sales effort.

40041 (50) Medusa does not set a minimum mill net figure below which it will not go in handling its sales. Each prospective order when it comes in is handled on its own merits. If the net is too low under all the circumstances, it is not accepted. In determining whether an order will be accepted there are many factors to be taken into consideration, such as the customer requesting

the shipment, the freight rate to the destination and the volume of business booked under other contracts. The element of the service which Medusa is in a position to render tends to discourage distant shipments.

(51) Medusa sometimes follows a contractor out of its normal sales territory if the job is attractive and in order to maintain its connection with that contractor.

(52) Generally speaking, Medusa tries to keep its contracts with all the trade it has shipped for a number of years, in an effort to hold its trade and to maintain its position with those dealers and customers where it has built up good will as a result of time and money expended by the company.

(53) We did not solicit purchases of standard gray Portland cement in Mississippi in 1935.

(54) The mill net means that amount which remains after deducting discount, package, and freight charges from the plant to destination from the lowest delivered price we have found at a particular destination.

40042 (55) Approximately 90 per cent of Medusa's customers take advantage of the cash discount in making settlement of their purchases.

(56) At all of the large consuming points in the sales territory, Medusa finds ten or more competing companies actively engaged in soliciting and selling cement. At many of the points in Ohio, Pennsylvania, and New York, there are around twenty competing companies.

(57) The Medusa Company has on occasion discontinued soliciting business in markets because prices have been so low that sales there were unprofitable. One such instance is in the Michigan market to which Medusa returned when prices increased. Medusa's discontinuance in such cases has not amounted to a complete withdrawal, since it has continued to fill all orders sent in by customers, but it did not intensively solicit business throughout the area. This was done so that Medusa would maintain its relations with its regular customers. Medusa's salesmen generally confine their activities to points where it obtains the best available mill nets.

(58) The Medusa Portland Cement Company obtains its information concerning the published and unpublished prices of its competitors by means of information picked up in the field by its salesmen. Its salesmen operate under instructions to transmit to the district sales office immedi-

ately any changes in the competitive practices or
40043 prices which they may find or hear of in the field.

The salesman is instructed to obtain a copy of such competitor's quotation, if it is possible. Medusa has found that friendly dealers are willing to turn over to its salesmen copies of price quotations received from its competitors. Its salesmen send to the home office all quotations of price changes or announcements of policy changes that they can pick up in the hands of customers. Medusa also gets much information of competitive moves directly from such customers by way of telephone calls or letters. From time to time, friendly dealers call us to inform us that one or more of our competitors has quoted either a lower or a higher price than the last price which we quoted. Another source of such information is tabulations of bids submitted to governmental agencies which are obtained by salesmen who attend the lettings, or from reports of the bids supplied by reporting services, or publications in newspapers, and other reporting agencies.

(59) It does not take a very long time for Medusa to get news of changes in competitive prices or policies. In most markets such information is obtained almost as soon as the competitive announcements are in the hands of the consuming trade. In all cases, the lapse of time is very short, and never more than a day, before Medusa is fully apprised of competitive moves through the information which its salesmen are able to obtain in the field.
40044 Commodity prices published in newspapers and trade journals are also a source of information which is considered occasionally along with information acquired through its salesmen. Competitors have never mailed to Medusa copies of quotations or sales policy which they issue.

(60) Medusa has found that dealers report to salesmen immediately information concerning price declines, at which time they usually request to have their recent orders protected and invoiced at the new low price. In recent years Medusa has generally followed this procedure on shipments made five days before the decline.

(61) Medusa has also found that in the event of a price advance, the dealers immediately bring that to the attention of its salesmen in an effort to find out whether or not they have to protect themselves on future shipments of Medusa cement. At the time of calling to the attention of

the Medusa salesmen, an increase by one company, dealers usually request information as to whether or not Medusa intends to follow along with the price increase. They also request information as to whether or not Medusa will protect them on certain specific jobs which they have sold to contractors or others.

(62) In the event of a change in price Medusa generally learns of the change in price at all of the important markets where a change was made.

(63) In the course of our daily operation, dealers
40945 normally telephone in their orders for cement. In calling in such orders there is usually no discussion of price, except at the time of a price change. The dealer is invoiced at the last price Medusa has quoted to him. If that price is higher than that quoted by any other company to that dealer, the dealer usually brings it to Medusa's attention and Medusa meets the lower price to retain the dealer's good will. At the present time all out-of-town telephone calls and telegrams from dealers or contractors about price changes and placing of orders are generally made with the charges collect.

(64) Medusa has found building material dealers and contractors to be well informed as to the delivered prices quoted on cement. It finds that purchasers compare the prices quoted by the various cement companies and keep in touch with the various sources of supply. It also finds that it is the practice of contractors to shop around to make sure that they obtain the lowest price quoted in any given market.

(65) Medusa has never found either a dealer or contractor willing to pay more for Medusa cement than for a competitor's brand, except during such periods as 1921 to 1923 in the States of Michigan and Wisconsin, when there was a shortage of cement and anyone with a stock of cement on hand could command a premium. Medusa has not only found that it cannot sell cement for more than its competitors, but it has also found that it cannot per-
40946 mit any competitor to sell cement in any market at a price less than that quoted by Medusa, or else customers will not purchase cement from Medusa and Medusa will be eliminated from that market.

(66) In the event of a decline of price, Medusa has found that its regular dealer and contractor customers give it an opportunity to meet the lower prices quoted by any

competitor. Medusa can and generally does meet the lower price to take care of its customers.

(67) Upon receiving information from the field about either a new quotation above or below the market, Medusa advises its salesmen to check all the delivered prices quoted at the various destination points in their territory. Its salesmen check the prices quoted by each competitor in an attempt to confirm either the old price or to ascertain what changes have been made at all of the important points where Medusa cement is consumed. Under these circumstances Medusa always contacts the dealers who consume large amounts of cement. This information is then telephoned and forwarded to the home office where Medusa takes the various quotations it has received, and analyzes the delivered prices which have been quoted.

(68) Medusa on analyzing these delivered prices has on several instances found that they show that a flat price was quoted at most of the points in some territorial unit such as Hamilton County or Cuyahoga County, Ohio, 40047 or the States of Ohio or Michigan. In such cases Medusa, after checking the delivered prices quoted at many points including all the major points of consumption, assumed that this price existed for the entire area in question until it found price quotations to the contrary.

(69) At other times, on analyzing these delivered prices, Medusa has found that the prices appear to form a pattern surrounding some mill or silo. In such instances, the delivered prices appear to vary in accordance with the amount of the freight rate from that mill or silo to the various destinations. When such a variation appears, Medusa then carefully checks to ascertain whether or not there is a uniform net at this mill or silo by deducting the freight rate from the quoted price. If Medusa finds such a uniform net at a competitor's mill or silo, it assumes that that competitor intends to limit himself to this mill net as a maximum on all his business. Such a mill net or maximum mill net is sometimes called or referred to as a base, price base, or so-called base price. This procedure of deducting the freight rate to some mill or silo is followed because over a period of many years, Medusa's calculations indicate that delivered prices sometimes appear to have such a relationship to a mill or silo. With that information as to the mill net or base, Medusa attempts to anticipate the delivered

prices which that company will quote at points where
40048 Medusa has not secured specific information as to the newly quoted delivered price, and Medusa assumes that it has met a competitor's price unless it hears to the contrary from the dealer trade.

(70) At other times Medusa has found from time to time prices which carry no definite relationship whatsoever to other prices. These are sometimes referred to as special or arbitrary prices.

(71) Upon receiving quotations from the field indicating a change in price, Medusa has no information as to the manner in which any one of its competitors has calculated its prices. Whatever Medusa learns as to how prices appear to be calculated is by analyzing the pattern which appears to be formed by such prices, if any such pattern exists.

(72) With this information as to the newly quoted delivered prices, Medusa issues quotations if it decides to meet the change. Upon issuing quotations to points at which Medusa has no specific information as to what prices are quoted, it has no assurance that Medusa's price will meet the prices quoted by the Company initiating the price change. As soon as Medusa has issued the quotations, unless it hears to the contrary from its dealers, it is sure that its quotations are as low as any quotation in the market. Medusa has found that when its quotations are higher than its competitors, the dealers inform it, and if the quotations were lower than its competitors they would be forced
40049 to meet Medusa's new low quotations. When the Medusa Company decides to meet reduced prices quoted by competitors, our salesmen are authorized to quote dealers verbally. The issuance of written quotations follows as soon as possible. Generally, when the Medusa Company quotes a price on its cement, it endeavors to ascertain the lowest price quoted by any of its competitors. If this price is not unprofitably low, we quote a price which is equally advantageous to the customer without any knowledge or assurance that any or all our competitors will quote the same, or a lower or a higher price.

(73) When Medusa broadcasts quotations, it sends them to all its dealers and to many prospective dealers. The Medusa Company and its predecessors, have for at least thirty years maintained a list of dealers from which it solicits business. When price quotations are distributed, one is sent to each of the dealers then appearing on this list.

Due to business conditions and changes, the list is constantly changing, new dealers are being added, and some dealers are eliminated therefrom. Medusa does not send them to any of our competitors. Medusa also does not receive quotations from competitors.

(74) When one of Medusa's competitors announced prices that were uniform throughout the Lower Pen-
40650 insula of Michigan, Medusa's sales office went through the usual routine of examining the pattern formed by the delivered price quotations secured in the field. As these quotations were the same for all destinations, Medusa did not expect that they would figure back to a uniform mill net at any mill or silo, and such was the case. A check was made to see whether or not by deducting the freight to various mills in that area uniform mill nets would result at the various producing points and silos. Medusa was unable to find any such relationship. One of Medusa's friendly dealers telephoned one of the sales offices of the company and stated that a salesman of the Huron Company had advised him that a flat price had been established for the Lower Peninsula of Michigan. Medusa concluded that a flat price had been established by the Huron Company.

(75) If after Medusa has deducted freight rates from the mill of some competitor to a number of destinations it reaches a uniform figure at that producing point, Medusa refers to that mill as a base mill or a basing point. Basing points as far as Medusa is concerned, are nothing more than figuring points and are so used in its office.

(76) Medusa has found that the number and location of basing points have changed from time to time. It has been Medusa's experience that frequently mills, which at one time Medusa determined from delivered prices as being basing points, have changed their status to that of
40651 non-base mills and vice versa. Medusa has never entered any agreement that certain mills were to be base mills and that other mills were to be non-base mills.

(77) The Medusa Company compiles a list of the mills and silos which appear to be basing points in the territory where it markets cement. Medusa salesmen are furnished with a copy of this list and also lists of Medusa's prices which they keep up to date as the home office advises them. Medusa has never received lists of basing points from any of its competitors. Salesmen are given this information so that they can readily determine Medusa's delivered

prices at those destinations in their territory where we have not given them specifically Medusa's delivered price. They are seldom called upon to quote prices. This information is useful in cases when contractors request prices within a salesman's territory but at a destination where he did not usually solicit business. When such a price is quoted by a salesman it is subject to confirmation from the home office by written quotation.

(78) Medusa attempts to obtain as much for its product as it can get and still sell its cement. It tries to keep 40052 its prices low enough so as not to encourage either distant mills to invade the market where Medusa sells cement or the building of new or expansion of old mills.

(79) It is the usual practice of the Medusa Portland Cement Company to quote destination prices. This has been the practice for many years and was the usual practice of Medusa's predecessors. It has also been the practice to meet the lowest delivered prices which Medusa found quoted in any market in which it wished to sell unless Medusa's price is lower or unless the market price makes it unprofitable or the sale is unattractive.

(80) The Medusa Company is generally a price follower and meets prices quoted by its competitors as long as it wishes to retain its identity in a given market; that is, until prices become unprofitably low in that market. This policy was adopted for the purpose of securing the full advantage of the geographical location of its mills.

(81) Where a good consuming market is found adjacent to one of its plants, Medusa considers whether it would be to its advantage to take the initiative and lower prices in this market and whether such action would tend to eliminate any competitors from that market. Thus, as long ago as 1924 Manitowoc found that there was a local demand for a good quantity of cement at our Manitowoc plant and it reduced its quoted prices around the mill. This re- 40053 duction amounted to about 23 cents in this area. This had the effect of substantially eliminating our competitors from this market. The nearest plant of a competitor was 220 miles from Manitowoc. The subsequent establishment of warehouses and silos at Malwaukee, Menominee, and Green Bay considerably limited the advantages of this price reduction.

(82) At times, some of the mills of the Medusa Company have quoted all of their prices in the area where a

particular mill sold cement, on the basis of the lowest quoted price in that territory. At such times mills making quotations in that manner have been called non-base mills. Medusa has followed this practice at some of its mills because the prices being quoted in that territory were very low and Medusa desired to obtain the maximum amount of net return from the sales of its cement in that area.

(83) When the Medusa Company decided to reduce its delivered prices around certain of its mills and put a maximum figure above which it would not net on sales, it issued quotations reflecting this decision. These quotations might be said to have had the effect of changing some of its mills from non-base mills to that of basing-point mills. No further or other announcement of this decision on policy was made. No agreement was entered into with any competitor concerning such changes.

(84) At various times the Medusa mill at Wampum, Pa., has been a so-called non-base mill. During those periods when the Medusa Company did not fix a maximum net at Wampum, it did not do so because Medusa had found from delivered quotations that the nearby mill at Universal, Pa., appeared to be a basing point and because Universal was located closer to the large consuming markets served by the Wampum mill, such as Pittsburgh and vicinity.

(85) The nearest large market served by Medusa's mill at Bay Bridge, Ohio, is Cleveland, Ohio. At various times Medusa has not had a maximum net at that mill, but has met the delivered prices quoted in the territory in which that mill markets cement. The reason for this has been the abnormally low prices in the Cleveland market area and, in addition, Medusa has found from quotations in the field that prices appear to reflect a base at the silos in the City of Cleveland.

(86) The largest market served by the Medusa mill at Dixon, Ill., is to be found in Chicago. At certain times Medusa has quoted the lowest prices in the Dixon market area, which it has found in the field, and, consequently, Dixon has been regarded or referred to as a non-base mill. Medusa's reason for this policy has been the low prices existing in and around Chicago and because Medusa found from delivered price quotations that the mills located at Buffington and LaSalle, Ill., appear to be base mills. The mill

located at Buffington, Ill., is much closer to the Chicago market than Dixon.

(87) The largest markets served by the York 40055 plant are the seaboard cities along the Atlantic Coast. At various times the Medusa Company has followed the practice of quoting the lowest quoted price found by Medusa on cement sold from the York plant. During those periods York was, therefore, referred to as a non-base mill. The reasons for Medusa's policy in this regard was the very low prices existent on the eastern seaboard which appeared to be so-called arbitrary or special prices around the seaboard cities. In addition, Medusa found from quotations in the field that the mills in the Lehigh Valley were so-called basing points. The mills located in the Lehigh Valley are much nearer to the major points of consumption on the eastern seaboard than is York, Pa.

(87a) The largest market served by the Medusa mill at Silica, Ohio, is to be found at Toledo, Ohio. At various times Medusa has not had a maximum net at that mill but has met the delivered prices quoted in the territory in which Silica markets cement. The reason for this has been that Medusa has found low delivered prices existing in and around Toledo and because Medusa found from these delivered price quotations that the silo located at Toledo appeared to be a base point.

(88) From time to time the Medusa Company set a maximum mill net at its various mills until today all of its mills are so-called base mills. Around all of the 40056 Medusa mills, there is to be found a good potential market for cement, not from the standpoint of volume consumed at the present time, but from the standpoint of potential consumption.

(89) In arriving at its delivered prices for the various destinations where it sells cement, Medusa recognizes that the market at many points at times reflects some base or basing point. Medusa, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base.

(90) The Medusa Company has always been and is free to quote any price it sees fit to quote, either initially or after a competitor has quoted it. Whenever it thinks the company will profit, it initiates a price change. At other times it meets prices quoted by competitors with the

intention of obtaining as much for its cement as possible. For instance, in Cleveland current quoted prices have been very low for a number of years. Medusa issued quotations in an attempt to raise the price there from $1.50 to $1.65 per barrel in October, 1937. Medusa sent out quotations for this purpose with the hope that competitors would follow this advance in price. However, they continued to quote $1.50 to Cleveland customers so that Medusa had to reduce its prices to the point where they were prior to Medusa's attempt to raise them.

(91) It has been the usual practice of the Medusa
40057 Portland Cement Company to quote and sell its cement for delivery f. o.b. destination. The reason that Medusa now follows that practice is that our experience has been that all purchasers buy cement on the basis of what it costs laid down at the point of use. Buyers express interest in the price at the point where the cement is to be used and not in a price at the mill. Medusa always found that the competition it had to meet was at the point of use. Medusa wants to be in a position to meet the competition of other cement producing companies.

(92) Medusa does not normally sell f. o. b. mill because it has found that its dealers complain of some of the results of such sales. Whenever Medusa sells f. o. b. mill it loses control of the product and the destinations to which it is shipped. The cement is diverted in transit. Whenever an outside dealer has diverted Medusa cement, Medusa's regular dealers at the point to which diversion was made have complained. Medusa is anxious to prevent diversion of its cement in order to maintain its dealers' good will. Medusa feels it can protect the dealers' good will only by protecting its regular dealers in their normal business markets.

(93) The Medusa Company has always followed the practice of not permitting diversion of shipments of its cement because its dealer relationships suffer from this practice. When the company loses control over the
40058 delivery of its cement, dealers have attempted to divert the shipment from the intended point of delivery to another point where delivered prices were the same or higher and thus realize added profit, or get additional tonnage.

(94) Medusa quotes delivered prices to enable it to compete with other manufacturers and to enable its dealer

and contractor customers to compare its quoted prices with the prices or delivered costs quoted by its competitors.

(95) Medusa and its predecessors have received very few requests from dealers or contractors for prices f. o. b. mill and these requests arose out of unusual conditions at the time of the request. Dealers and contractors almost invariably request prices f. o. b. destination. The Medusa Company has sold a very large proportion of its cement at delivered prices because its customers have requested delivered prices.

(96) In a few instances, most of which were subsequent to July, 1937, Medusa has received requests from departments of the Federal Government for bids only on an f. o. b. mill basis. In a number of other instances, 40059 departments of the Federal Government have requested that bids be submitted either on a price f. o. b. destination or on an f. o. b. mill price. In the great majority of instances, the Federal Government has requested bids solely on a f. o. b. destination basis.

(97) Almost without exception, the few requests for f. o. b. mill prices which the Medusa Company has received have come from the Federal Government. Medusa has usually bid destination prices instead of f. o. b. mill because it has found that the Federal Government always makes its awards on the basis of the lowest cost at the point of use, and because it believed that if Medusa were to quote certain divisions of the Federal Government on an f. o. b. mill basis, it would soon run into trouble with its dealers.

(98) Medusa has no policy against making sales f. o. b. mill.

(99) It is the general practice of Medusa on all Government work, both federal and State, not to bid lower than its regular commercial price at any particular destination. The reason for this practice, aside from the fact that Medusa has never felt that the Government is entitled to any lower price than its regular trade, is the fact that it believes that a lower price to the Government would react unfavorably with Medusa's customers. One of Medusa's reasons for not giving a special price to the Government on any particular letting, is that Medusa believes 40060 that its customers would seek similar price considerations. Medusa respects the views of its dealer and contractor customers because it has to rely on their regular business. Another reason is the Medusa has not

found that the Government is a more desirable customer than commercial customers. Government business is spotty and never results in what can be called "having a customer"—that is, a regular year-in and year-out customer.

(100) In filling out an invitation to bid to the State or federal agency, Medusa looks at its destination price file and inserts in the bid blank the price which is shown on the price cards. During the N. R. A. Code period, Medusa bid the lowest price which it found on file with the Code Authority.

(101) With regard to the entire market area in which the Medusa Company sells its cement, there appears to be no one company which might be regarded as the price leader. From time to time, various companies have initiated price changes. Neither The Cement Institute nor any competing cement company has ever attempted to influence the Medusa Company with regard to the initiation of price changes. The Medusa Company has never entered into any agreements or understandings with any of its competitors to establish prices on cement. The Cement Institute has never interfered with competitive condi-
40061 tions as far as the Medusa Company has been concerned.

(101a) During the period when the N. R. A. Code of Fair Competition was in effect, the Code Authority notified Medusa whenever we did not quote the prices which were on file with the Code Authority. In no instance did the Code Authority inform Medusa what price it should file.

(102) Since Medusa and its predecessors have been in the cement business, they have observed a great number of reductions in delivered prices at points where the Medusa Portland Cement Company markets cement. In the case of such reductions in price Medusa has found that its volume of business in such markets has not been increased, and that after reductions it has found that its customers and prospective customers have reduced the amounts of their purchases. Medusa has observed in the case of price declines that practically all of the companies competing with Medusa have met the reduction in prices in the affected markets within a few hours and that Medusa has neither increased the amount of its orders in such markets nor increased the proportion of sales it makes to the total amount of going business at such markets. In the case

of those price reductions experienced by the Medusa Company, it has not found that the company initiating the price reduction has been able to take any substantial amount of business away from the Medusa Portland Cement Company whenever Medusa has met the lower prices. It has
40062 been the usual practice of the Medusa Company to meet such lower prices, and Medusa has found that it could not sell cement at the old and higher prices.

(103) From time to time Medusa has observed increases in delivered prices in territory where Medusa markets cement and it has found that when an increase in prices is announced by one company and followed by other companies that its customers in such markets have usually increased the volume of their purchases. Such purchases are made at the low prices existing before new and increased prices become effective.

(104) Medusa protects its purchasers, both dealers and contractors, who are interested in specific business by entering into specific job contracts or specific sales orders. These contracts or sales orders protect its purchasers on such business in the event of an increase in price, and Medusa finds that it does not receive full benefits of a price increase for a number of months. In the event of a price decline, sales are immediately made at the new low price, and in the event that any substantial amount of shipments are made immediately before the decline, it has been Medusa's practice to reinvoice such shipments so that the purchaser got the benefit of the low price.

(105) In the territory in which Medusa normally solicits business, there is no instance where Medusa
40063 has not been aware of an openly quoted change in price, especially a price decline, within a few hours after it has originally been received by the dealer trade.

(106) Medusa normally sells at its openly quoted price. From time to time, it has found that it was impossible to make sales to a friendly contractor or dealer at Medusa's openly quoted price. In such cases there had been nothing in its previous relations that would account for his not doing business with Medusa. Medusa has then considered making reductions or deviations from its openly quoted price. In some instances, Medusa has made some deviations from its openly quoted price. The reasons for considering such deviations and in some instances making them, has been the fact that Medusa believed that a com-

petitor had offered to this friendly dealer or contractor a price lower than Medusa's quoted price.

(107) On many jobs special prices or terms have frequently been available to the user of large quantities of cement. These prices were at figures less than the lowest published market prices or at more favorable terms. Medusa has on occasion met such price concessions in order to secure the business. There may be and probably are price concessions which some of Medusa's competitors have made which Medusa does not know about, but Medusa has found that under normal circumstances a friendly dealer or contractor customer of the Medusa Company will tell its salesmen in the event that he has secured
40064 a special concession from a competitor, and has given Medusa the opportunity to meet such concessions. From time to time, Medusa has made price concessions to contractors and dealers in an endeavor to meet the competitive situation which it found.

(108) Medusa has always made its terms at least as favorable as any granted by any competitor because it could not compete as long as it was offering terms which are less advantageous than those offered by other manufacturers. From experience, Medusa has found that whenever one of its competitors started giving more favorable terms that it had to adopt the change. Medusa's reasons for not granting more liberal terms are that its terms are already as liberal as practicable and Medusa believes that its competitors would meet any more liberal terms.

(109) In the general and district offices of the Medusa Company card files are maintained which indicate the last price quoted by the company to any given customer. Because of the nature of the records, notation is made on these cards of price quotation only when the quotation involves a change in price. Some years ago, it was a regular practice of the Medusa Company to send out general price quotations periodically. This policy had value by way of advertising aside from the price information which was conveyed thereby to customers and prospective customers. Because of the expense and the clerical
40065 work involved, the company has not followed this policy in recent years. However, if a good reason were to appear, the Medusa Company would not hesitate to send out general quotations. No duplicate copies of quotations mailed are kept by the company.

(110) Salesmen of the Medusa Company carry road books which contain one page for each dealer in the salesman's territory. Destination prices which the company offers to this dealer are noted on the appropriate page.

(111) The Medusa Company sells cement directly to dealers, federal, State and county governments and to railroads. Direct sales are also made to contractors for road work outside of municipalities. In general, direct sales are made by the company wherever a dealer's services are not required. On road work inside of municipalities, a dealer is able to transport and deliver the cement and even take care of batching the cement and other materials. Outside the city he is generally unable to perform this service. Medusa has sold the railroads at the nearest rail connection, and also at a destination point, whichever they have requested.

(112) On February 22, 1935, the Medusa Company announced a policy regarding classification of customers. Prior to this announcement dealers had requested a statement from the company. The dealers desired to handle sales to W. P. A. Medusa found from the dealer 40066 trade that a competitor had announced a policy about this time. The Medusa Company decided that it would follow in general this openly announced policy because it represented substantially the classification which the Medusa Company had been using but which it had not broadcast to the trade.

(113) On April 10, 1935, the Medusa Company announced a policy regarding the classification of customers. Prior to this announcement, Medusa found from the dealer trade that a competitor had announced a new policy concerning the classification of customers. Medusa's dealers requested a statement from the company as to what it proposed to do. The Medusa Company decided that it would follow this openly announced policy because it represented substantially the classification which the Medusa Company had been using prior to that time and included no radical changes over the Medusa policy announced on February 22, 1935.

(114) It had been the general practice of the Medusa Company to sell cement for emergency relief work projects through dealers because it believed this type of work could better be serviced by dealers and was the type of business dealers were normally handling prior to the de-

pression. When Medusa found some of its competitors quoting W. P. A. direct, Medusa met this competition in that territory where it existed.

(115) The Medusa Company had no agreement
40067 with any of its competitors with regard to the adoption of this classification of customers announced in its policies of February 22 and April 10, 1935.

(116) Medusa's concept of a dealer has been in effect with Medusa and its predecessors for thirty years. Medusa requires its dealers to be persons to whom the purchasing public looks in buying cement and other building materials. Medusa is therefore interested in knowing what stock of building materials a dealer carries on hand and whether or not he has a good credit standing. Medusa has made it a practice to investigate dealers carefully to see whether or not they are in a position to assist in the marketing of Medusa's cement.

(117) In April, 1935, Medusa, as a part of its announced policy, included a definition of a cement dealer substantially as it was contained in the N. R. A. Code for the Cement Industry. The application of this definition varies to meet local business conditions. When one of Medusa's salesmen locates a new dealer who he feels is qualified to handle our cement, the salesman will recommend the dealer's name to the district sales manager. If the district sales manager has any question he refers the dealer's name to the general sales manager. These references are both written and verbal. They rarely reach the home office, that is, the general sales manager. Whether or not a given dealer is a member of one or more dealer associations has no effect on the question of whether
40068 or not the Medusa Company will sell him cement. The Medusa Company does not decline to sell cement to a dealer because he does not belong to a dealer association.

(118) A dealer may be unable to purchase cement from the Medusa Company because it feels he is a bad credit risk or because he does not possess the equipment and personnel necessary to serve his community or because he may have a place of business at one of the few points where we have an exclusive dealer arrangement. An exclusive dealer arrangement precludes Medusa's soliciting business from or selling cement to other dealers in a particular market. Under these exclusive dealer ar-

rangements the dealer may purchase and sell other brands of cement but Medusa cement is his brand "leader." Medusa has exclusive dealer arrangements with only a very few dealers.

(119) The dealer is Medusa's most important customer. The percentage of business that Medusa sells through its dealers is around 80 percent. The importance of the dealer has had a tremendous influence on Medusa's marketing methods and policies. Medusa is confronted with a constant necessity for preserving dealer outlets, for fostering the dealer's good will, and giving him a price and terms that will enable him to compete with other dealers selling in the same consuming area.

(120) Prior to July 2, 1937, the dealer paid
40069 freight charges for Medusa's account. When he did so pay the freight, Medusa considered that he was paying a portion of the price of the cement.

(121) The experience of the Medusa Company has been that deliveries either to dealers' trucks or by contract truckers is not as satisfactory from the point of view of economic plant operation as rail deliveries. The Medusa Company has, therefore, used rail deliveries except where it finds it necessary to meet the competition by trucks as employed by its competitors.

(122) Medusa has found that in certain localities its dealer customers request only shipments by rail and do not request shipments by trucks. When Medusa was loading dealers' trucks our dealers complained, from time to time, that truckers or outside dealers were delivering cement at destinations for which it was not ordered, and were thereby invading the local dealer's market. This appeared to disturb Medusa's dealers, and they registered complaints with Medusa. Medusa's main sales outlet is through dealers and it is to its best interests to so deal with them that they will be able to compete with dealers who purchase cement from competitors. In order to maintain the dealers' good will, Medusa believes that it is necessary to be sure that its cement will not be peddled at lower prices in a given community than it is offering to
those of its regular dealers who have established
40070 places of business in that community. Medusa has at times not met the trucking service offered by a competitor wherever it found that its dealers did not want trucking service.

(123) Medusa's first experience with trucking originated around 1919 at which time there was a shortage in railroad cars. At that time Medusa quoted delivered prices to dealers to be shipped when rail equipment was available. Medusa, however, offered to let the dealers come to the mill and truck the cement, in which case it deducted the rail transportation costs from the delivered price which it had quoted to them. This practice continued during the car shortage period. Although Medusa permitted the trucking of cement in 1919, it was not geared up for it: Trucking continued from its mills in a very limited manner up until 1929.

(124) Around 1929 Medusa found that some of its competitors were extending trucking services which they made available to their dealers. As a result Medusa extended its practice of allowing its customers to come to the mill with their trucks in order to meet this competition. Medusa met this type of competition in those territories where it found it during the period from about 1929 to 1932. At one time Medusa mills and plants had a platform price which was charged to all dealers. At other times the dealer was sold on the basis of the delivered price at his destination less the cost of rail transportation.

40071 (125) Shortly after Medusa opened the gray Portland cement mill at York, Pa., it found that some competitors were selling to dealers at an f.o.b. platform price at their mill which was 15 cents above the base which Medusa determined from delivered price quotations that that company was using in quoting its delivered prices. At that time Medusa was selling to dealers for truck delivery at the York mill on the basis of the delivered price at the dealer's destination, less rail transportation costs. Medusa adopted the practice of selling cement for truck delivery on a platform price which was 15 cents above the base which Medusa put on our York mill. This practice was established in order to compensate Medusa for the additional expense and trouble entailed as a result of truck delivery, to protect its good will with its regular dealer customers by selling to all of its dealers on the same truck price, and to protect a local dealer from the delivery of Medusa cement by truckers or distant dealers to the local dealer's regular market.

(126) The Medusa Company found that this special trucking price reduced to a great extent the criticisms with

which it was confronted by its dealers and made it easy for it to maintain the good will with its customers. Medusa consequently adopted a similar practice at its other mills and silos.

(127) In the spring of 1932, the Medusa Com-
40072 pany found that one of its competitors had announced the trucking policy of delivering by contract trucker to the dealer's destination, and making the sales on the basis of destination price or offering the dealer the opportunity of coming to the mill or silo and taking delivery there at the destination price. Shortly thereafter, the Medusa Company entered into agreements with contract truckers and adopted a similar policy, thereby meeting the competition which it found. In rendering such service, the Medusa Company paid the contract trucker for delivery to the dealer's destination. Since adopting this policy the Medusa Company has received no complaints that distant dealers or truckers were invading the territory of a local dealer and one of our reasons for meeting this form of competition was to protect the good will of our dealers.

(128) The Medusa Company has made an effort to determine the radius within which trucking is most economical, but the survey has been of little practical value because Medusa has had to meet the practices instituted by its competitors which appear to bear no relation to the cost of trucking and truck loading.

(129) The Medusa Portland Cement Company transports a substantial amount of cement in a boat which is operated by one of its subsidiary companies. The cement thus transported is carried from Manitowoc to the various distributing silos of the company. The cement is
40073 shipped in bulk, it being loaded and unloaded mechanically by pumps and screw conveyors.

(130) In the few instances where Medusa has sold cement for water delivery, it has had to make the delivery in small quantities of package cement with the result that there was no saving in making water shipment as against making the shipment by rail.

(131) The Medusa Company comes into competition with imported cement only in an around Baltimore and possibly a few other points on the eastern seaboard, at which its volume of business is very small. This foreign cement has had the effect of lowering prices in Baltimore

and the seaboard markets and also of inviting other manufacturers to more intensively solicit business at markets farther inland, where cement prices were higher.

(132) The Medusa Company has not reduced its prices to the level at which foreign cement is sold because dealers are willing to pay a slight premium for domestic cement.

(133) The Medusa Company never maintained a stock of cement or a warehouse in Brooklyn. The Medusa Company has never refused to sell a dealer cement because he was handling foreign cement. In recent years, imported cement has not been a serious problem because the volume of imports has decreased.

(134) Up to July 1, 1937, the Medusa Company received copies of statistical reports sent out by The Cement Institute. This information consisted of a monthly statement of production of clinker and ground cement shipments and stock on hand for the past month. This information was distributed by The Cement Institute without any comment. None of this statistical information had any reference whatsoever to price or any elements of price. Medusa used this statistical information merely as a means of keeping posted on matters of general information. It also received Government reports made by the United States Bureau of Mines which covered substantially the same ground, but which were received at a considerably later time.

(135) The Medusa Portland Cement Company has never solicited sales of standard gray Portland cement in the Boston metropolitan area. The reason for not soliciting in the Boston metropolitan area is that it would yield us a very low mill net, and is in a territory where we cannot render as good service as mills located elsewhere. Medusa has from time to time sold and solicited sales of some of its special cements and other products in that area. During the past 10 years it has from time to time sold gray waterproofed cement and white cement to the Waldo Brothers of Boston, but we have never been requested by that company to sell them standard gray Portland cement.

(136) The records of the Medusa Portland Cement Company show that Medusa did not make any shipments from December 1, 1933, to June 30, 1934, to any purchaser at either

Wickcliffe, Willow and Condit, Ohio; Montgomery,
40075 Mich., or St. Denis, Md. All of these points, with the exception of Willow, are very small towns in which Medusa has done very little business. Willow is a railway station within metropolitan Cleveland, and any purchaser of cement who bought for shipment to Willow was sold at Medusa's quoted price for the City of Cleveland. The Medusa Company has never sold a building supply dealer located at either Willow or Conlit, Ohio.

(137) In determining the prices which the Medusa Company filed with the N.R.A. Code Authority for the Cement Industry, it was the policy of the company to meet the lowest delivered price which it believed was current in any market, and to file that price, and, in the event that the Medusa's filed price was discovered to be different from the prevailing market price, Medusa re-filed a price which would meet the then existing competition in that market.

(138) The Medusa Company has always made sales at the same delivered prices in Willow, Ohio, as the delivered price which it had for the City of Cleveland.

(139) The records of the Medusa Portland Cement Company show that delivered prices in Northeastern Ohio appeared to reflect a base at Cleveland, Ohio, since around July 1, 1929. Immediately prior to that time there was a flat price for Metropolitan Cleveland which included all of Cuyahoga County.

40084 By Mr. Withrow:

Q. Now, Mr. Dawson, have you ever been a member of the board of trustees of The Cement Institute?

A. I have not.

Q. Have you ever been on or have you ever served on a committee of The Cement Institute?

A. No.

Q. Commission's Exhibit 1063 purports to show that the Medusa Company was mailed an invitation to bid for delivery on cement at Rolling Fork, Miss., and the testimony is that no bid was received from the Medusa Company. Can you tell us why the Medusa Company did not bid in that instance?

A. We received the bid, and after observing the destination, we were not interested at all. It is outside of our territory.

Q. Mr. Dawson, I show you Commission's Exhibit 1339, and ask you if you are familiar with that invitation (handing a document to the witness)?

A. Yes.

Q. Now, was there any discussion in the office of the Medusa Company concerning that invitation to bid?

A. Yes, sir; there was.

Mr. Withrow: For Your Honor's information, 40085 that is the Good Friday bid.

Trial Examiner Norwood: Yes.

By Mr. Withrow:

Q. Did Medusa bid in this instance?

A. No; we did not.

Q. Would you tell the Examiner the reasons why the Medusa Company did not submit a bid?

A. We considered it an option for a quantity of cement without stating the amount to be delivered at any one point or within any zone. There were also a few other points that we were thinking of at the time. We were selling W.P.A. projects. Our storage facilities were such that we did not want to tie up any great quantity of cement. I think the main objection was that it was just an option for a quantity.

Q. When you said you were selling the W.P.A., did you mean that you were selling it through dealers?

A. Yes; that is right—selling it through dealers. I meant to say that.

Q. Now, did the Medusa Company ever agree to restrict its production to 70 percent of the capacity of its mills?

A. No.

Q. Did the Medusa Company ever restrict its production in any year to the figure of 70 percent of the capacity of its mills?

A. No; it did not.

40086 Trial Examiner Norwood: Was it ever able to sell up to 70 percent of its capacity?

The Witness: What was that question?

Trial Examiner Norwood: Has it ever sold up to 70 percent of its capacity?

The Witness: Yes; back prior to 1930.

The witness identified Resp. Exs. 3063 and 3064 as papers prepared under his supervision in his office at Medusa. He vouches for their accuracy. The information

was prepared from the records of production and sales kept in the regular course of business in Medusa's office.

40087 Mr. MacIntyre: May I ask a question on voir dire?

Trial Examiner Norwood: Proceed.

Examination On Voir Dire by Mr. MacIntyre.

Q. When were those two papers made up, Mr. Dawson?

Mr. Withrow: Your Honor, with reference to that, we are willing to concede that these papers were made up for the purpose of being used in this case. They were made up by the Medusa Company at the request of Respondents' Counsel.

Mr. MacIntyre: How recently?

Mr. Withrow: Within the last year or year and a half.

By Mr. MacIntyre:

Q. I would like to ask, Mr. Dawson, if you forwarded to the Bureau of Mines the data concerning your production and shipments that would conform, as you have seen them, to the information appearing on these two documents?

Mr. Withrow: Your Honor, I object, because it is improper voir dire examination. There is no connection between the Bureau of Mines and these tabulations in any way, and this would have no bearing on the relevancy or materiality or competency of the documents in any way.

Trial Examiner Norwood: I think he might give counsel that information.

40088 Mr. Withrow: This question and answer are solely for the purpose of argument by Counsel for the Commission, not for the purpose of making legally applicable objections, and that is the only purpose of voir dire examination.

Trial Examiner Norwood: In ruling on these objections, I would like to know the situation as to where some of these figures can be verified. It makes a difference in the clearness of the situation.

Mr. Withrow: Your Honor, these can be verified from the shipping records and production records of the Medusa Company. That is the only basic material; that is the

source from which this information was taken. Now, figures which exist anywhere else have nothing to do with these tabulations, because these tabulations were not prepared from any other figures.

Trial Examiner Norwood: Objection overruled. I will let him answer that.

A. As to production and shipments, they correspond with the figures sent to the Bureau of Mines.

By Mr. MacIntyre:

Q. Year by year, over that period of time?

A. Yes.

Mr. MacIntyre: If Your Honor please, we have no objection to these two documents, provided we are
40089 permitted to check the data appearing thereon for their accuracy with the Bureau of Mines' figures, which, of course, are close at hand. We can check them there without going to any expense or great delay in doing so.

Mr. Withrow: Your Honor now sees that the question was asked solely for the purpose of trying to enter into some sort of bargain and not for the purpose of arriving at or establishing a basis for a legally applicable objection. We have no objection to Commission's Counsel examining the shipping and production records of the Medusa Company, but this collateral bargain is another matter which will have to be discussed. I do not think they are entitled to that. If they can show any special reason why they should see them, that is something else, but we are offering to make the basic material available.

Trial Examiner Norwood: It does go to the ease of verification. Does Counsel object to—

Mr. MacIntyre: I have stated that we would have no objection to these being received in evidence in view of the fact that we could verify the data, where the witness stated we could verify them, without having to go to Cleveland to do so. We can do so in the City of Washington, in an accredited set of records, such as the Bureau of Mines, and in that event we would have no objection to the documents.

40090 Trial Examiner Norwood: Do you want that basic material brought here to Washington so that they can see them?

Mr. Withrow: It would be a great volume.

Trial Examiner Norwood: Yes.

Mr. Withrow: The only question involved is whether we are dealing here with legal principles or whether we are dealing with matters of convenience to Counsel for the Commission. That is the sole issue.

Trial Examiner Norwood: I think the legal principle is involved as to whether you are willing to come in and tell the whole story and make this check available to the other side. This question has come up many times, and I think Counsel should agree about that and discuss this matter of checking with the Bureau of Mines, which is much simpler, and which will save a great deal of time and some expense. Counsel should make a definite agreement, to the end that it cannot prejudice you in any way.

Mr. Withrow: I do not understand what good an agreement would be on this. We have already gotten an agreement on tabulations, and these tabulations fall definitely within that agreement, and under that agreement the only thing that has to be made available is if errors are found, the basic data would have to be made available. Now,

40091 they have not even shown an error, but we are offering to make the basic data available, and that is the only question involved here.

Trial Examiner Norwood: He wants the data to check for errors, to see whether there are any or not.

Mr. Withrow: We are perfectly willing to offer the basic data, regardless of the stipulation, and our position on that is that in any court of law those tabulations would be admissible, and we are pressing for their admission.

Trial Examiner Norwood: We will have a 10-minute recess. Possibly Counsel can discuss the matter with each other, and we will save further argument on the point. (A short recess was taken.)

Trial Examiner Norwood: Gentlemen, please come to order.

Proceed.

Have you reached any workable solution of that question?

Mr. Withrow: Off the record?

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: Well, on the record.

I shall sustain the objection until such time as the basic data is produced here for checking.

Mr. Withrow: I would like to point out to Your
40092 Honor that that ruling violates the stipulation entered into between Counsel for the Commission and Counsel for the Respondents; that is, the stipulation with reference to tabulations.

I also would like to point out during the Commission's case that tabulations of bids and other tabulations were received with the understanding that basic data was to be supplied subsequently. In a number of those instances we pointed out to Your Honor that the basic data was not supplied, and those documents, in spite of our motions to have them removed from the record, have not been removed.

In this instance, we are put to the burden of bringing the basic data first, and we want to make note of a specific exception both to the overruling of the stipulation which was entered into and also to applying a different rule with reference to the presentation of basic data during the Commission's case.

Trial Examiner Norwood: I think if Counsel will look up the circumstances he will find he is mistaken as to a part of the statement there.

I will say, though, that if Respondents will bring these documents in with a certificate of any official of the Bureau of Mines that they have been checked with those figures,
and found correct, that the Commission's Counsel
40093 has agreed to withdraw his objection, and in that case I shall receive them.

Proceed.

Mr. Withrow: Just in order to make the record clear, when I referred to a stipulation, I was referring to a stipulation which was entered into at record page 1612, at which time Mr. Leisure made the statement, and Your Honor accepted it, and Mr. Wooden also accepted the stipulation. That was the one I was referring to.

Trial Examiner Norwood: Well, we have discussed that stipulation several times with respect to receiving these tabulations of this identical nature, and I think it is clear that the stipulation does not cover those.

The witness identified Resp. Ex. 3065-A to F as having been prepared in his office and under his super-
40094 vision. He can vouch for its accuracy. Resp. Ex. 3065 was prepared from "our" records of sales and shipments kept in the regular course of doing business. It is the regular course of Medusa's business to keep those records.

Examination On Voir Dire by Mr. MacIntyre.

Q. Mr. Dawson, the showing made by Respondents' Exhibit 3065-A to F, as to your company operation for the year 1937, is that somewhat typical of years previous to that year?

A. I could not answer that question without having some information available to make a comparison.

Q. Well, is there any great difference in the general picture as you see it for that year as compared to the previous years?

40095 A. As I said before, I could not answer the question without the comparative figures.

Q. You have not made such a comparison?

A. No.

Mr. Withrow: Just a minute.

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Dawson, do you know of any reason why the figures for any other years would differ substantially from the figures for 1937?

A. Yes. There is, as far as the shipments into zones, that could flutuate from year to year depending somewhat on large projects. For instance, on York, 75 to 100 miles, it shows that during 1937 there was 164,000 barrels, approximately. It is possible that years prior or subsequent years might show that there was substantially a larger amount shown within a radius nearer than 100 miles.

Q. So that large projects might affect it?

A. They could affect it very easily.

Mr. Withrow: That is all.

Examination On Voir Dire by Mr. MacIntyre.

Q. Large projects do not affect the amount of variation in amounts shown in the other columns, except the percentages?

A. Which column are you referring to?

40096 Q. The third, say.

A. The percent?

Q. No, the mill nets.

A. The mill nets?

Q. The variation, just about as they appear there for years—

A. Oh, that is apt to vary also, depending on what the destination price would be.

Q. They do never vary as shown by this exhibit here for the years previous to 1937?

A. There might be some variation.

Q. The facts are that they do; isn't that true, Mr. Dawson?

A. Well, naturally—

Q. In much the same manner as they are shown by this exhibit?

A. No, I could not say they are comparable to that, or they would be in the same relation; I could not say that.

(RESP. EX. 3065-A to 3065-F was offered and received in evidence.)

Direct Examination by Mr. Withrow (Resumed).

By Mr. Withrow:

Q. Did the Medusa Company ever agree to exchange specific job contracts with its competitors?

40097 A. No.

(The foregoing testimony beginning "Did the Medusa Company ever agree" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

40098 Q. Mr. Dawson, do you recall the N.R.A. Code provision for plan for sharing available business?

A. I do.

Q. Will you tell us what position the Medusa Company took toward this provision of the Code?

A. We attended several of the meetings but took no active part either for against the plan that was submitted.

Q. Did the Medusa Company ever operate pursuant to any plan of sharing business?

A. No.

(The foregoing testimony beginning "Did the Medusa Company ever operate" was adopted by Georgia, Oregon, Giant, Utah, Standard and Vulcanite.)

40101 Q. Now, Mr. Dawson, if you can recall, would you tell us approximately the money paid by the Medusa Portland Cement Company in 1936 for the freight rate service of The Cement Institute?

A. As I recall it, it was approximately—well, between twenty-two hundred and twenty-three hundred dollars.

40102 The witness identified Resp. Ex. 3067 as figures prepared at his office at Medusa under his supervision. He vouches for the accuracy of the figures. They were obtained from Medusa's records of shipments kept in the regular course of business. It is the regular course of business to keep such records.

Mr. MacIntyre: Objected to as immaterial.

40103 Trial Examiner Norwood: The objection is overruled. It is received as marked.

(COM. EX. 3067 was offered and received in evidence.)

By Mr. Withrow:

Q. Mr. Dawson, is there a Mr. Pfeifer connected with the Medusa Company?

A. Yes, sir.

Q. What position did he hold during 1934 and 1935?

A. Auditor.

Q. Had he any connection with the sales department prior to January 1, 1936?

A. No.

Q. Did he have anything to do with the establishment or determination of the sales policy or sales practice prior to July, 1937?

A. No.

Q. Were you connected with the Manitowoc Company at the time it quoted a delivered price which reflected a fixed mill net or so-called base at the Manitowoc plant?

A. Yes.

Q. Were you familiar at the time why this step was taken?

40104 A. Yes.

Q. I would like to direct your attention for just a moment to paragraph 81 of your stipulated testimony, and ask you to state whether the reduction of 1924 is the instance that we are now talking about?

A. Which one is that?

Q. Here (indicating).

A. Yes.

Q. Now, the record in this case that in July, 1930, you took similar action; that is, you reduced delivered prices which affected the bases at your mills at Silica, Dixon,

and Newaygo. Are you familiar with the circumstances under which this action was taken?

A. Yes.

Q. Would you tell us briefly what those circumstances were?

A. Well, we found that the destination prices had been reduced; they were cut prices; I think in some cases there were general reductions in prices by our competitors. We endeavored to establish a price that would be low enough to stop any further reductions, at the same time be high enough to permit us to make sales without any serious loss.

Q. These prices which you quoted, which reflected bases, were they increases or decreases in the quoted prices then current in the market?

A. Decreases.

40105 Q. Did you find that there ceased to be any further reduction in delivered prices after this section by the Medusa Company?

A. No; the prices went down even later, after that.

Q. Could you give the Examiner an idea as to how low the prices went in comparison with the maximum mill net that you set at those three mills?

40106 A. I cannot say how low it did go, but I do recall that the prices we named were eliminated because of further reductions in price.

Trial Examiner Norwood: Well, the prices you named were below the prices you found?

The Witness: Do you mean when we came out with the so-called base price?

Trial Examiner Norwood: Yes.

The Witness: Yes, it was; but the prices went down still lower, which made that price inoperative.

Trial Examiner Norwood: When was that?

The Witness: That was in 1932, I believe.

By Mr. Withrow:

Q. That is when they became inoperative?

A. Yes.

Q. The delivered prices?

A. Yes.

40115 Q. And under what circumstances?

A. Well, it is more or less a convenience to the other manufacturers' customers. For instance, white ce-

ment, a customer might need a few barrels of that. Well, the manufacturer will take a carload into his warehouse and out of that supply—furnish the small dealer his requirements.

Q. And in those instances are you selling prod-
40116 ucts which the other manufacturers do not manufacture?

Mr. MacIntyre: I object to further detail on this question. It is immaterial to the issues.

Mr. Withrow: Well, if Counsel for the Commission is willing to concede that these matters with reference to these specialty products, and white cement, are not in the case, I won't go any further. I tried to get one document out unsuccessfully.

If they will make that concession, I won't go any further; otherwise, I think we have got to go into it.

Trial Examiner Norwood: Is there any evidence in here charging him with—

Mr. Withrow: Well, there is evidence which has a bear-
ing on this matter of their specialty products; in-
40117 cluding white cement. Now, with the concession from Commission's Counsel, that would be satisfactory to me; otherwise, I think we are going to waste hearing-room time. I thought perhaps we would have settled it when I brought up Commission's Exhibit 2238, but it did not.

Mr. MacIntyre: Of course, we cannot concede where the company represented by this witness, and companies allegedly competing with it, sits down around a table or communicates with one or the other, and discusses prices on special cement, and, incidentally, along in that discussion they discuss matters relating to gray or standard Portland cement, we cannot agree there to never use the fact showing that the discussion occurred. It naturally has some bearing here, but we do concede, just as Mr. Withrow has asked us, that no point would be made of any particular discussion, or the particular parts of any par-
ticular discussion that related wholly to these
40118 special cements.

Mr. Withrow: I am a little bit at a loss as to that concession, and, if I can restate—first or all, I might state, I do not know of any proof that would fall in the first category, but if I understand that, any testimony that is oral or written, which applies solely to these specialty prod-

ucts, is not to be considered in this case to be used for any purpose, but I understand Mr. MacIntyre's position that in case there are points about gray, standard gray Portland cement in the same document, that naturally he would expect to use the statements about standard gray Portland cement. If that is his concession, we accept that and will not proceed any further.

Mr. MacIntyre: Well, what was meant by the word "special" cement, as I used it, something entirely aside from Portland cement. Of course, we have special grades of Portland cement for special specifications.

Mr. Withrow: Let us be specific. Do you include white cement, or don't you?

Mr. MacIntyre: Certainly, when I use the word "special" cement, I intended to include Medusa white, Medusa waterproof, and a couple of other swimming-pool cements manufactured by the Medusa Company. I had those in mind.

Mr. Withrow: Well, that is agreeable.

40019 Mr. Withrow: Just one thing: There are three more products, I want to make sure, are covered, I am sure Mr. MacIntyre meant to cover, that is cement paints, their waterproofing—

The Witness: Mortar cements.

Mr. Withrow: And mortar cements, things in that general category.

Mr. MacIntyre: I think that those were included in my category of special.

Mr. Withrow: That is one thing I wanted to make sure so that there would not be any misunderstanding.

Trial Examiner Norwood: Yes.

40120 Washington, D. C.,
Tuesday, June 4, 1940.

40123 Trial Examiner Norwood: Now, in the matter of Respondents' motion to strike from the record Commission's Exhibit 2762-A to E, it appears to refer almost entirely to negotiations as to fair price conducted between a representative of the cement company, Medusa, and the State authorities of Ohio. Is that not right?

Mr. Withrow: Illinois.

Trial Examiner Norwood: Of Illinois, yes.

I think it should be struck.

Mr. MacIntyre: If Your Honor please, our position is different from that, and for this reason: We consider that the exhibit shows that the Medusa Portland Cement Company was standing pat, so to speak, on the identical delivered price that it had theretofore quoted, and would not recede from that position.

40124 Mr. MacIntyre: Oh, sixteen Respondents bid at exactly the same price for each of the 102 destinations, except where one or two bid higher so as to eliminate themselves from particular destinations.

Trial Examiner Norwood: Well, didn't they propose to submit other bids?

Mr. MacIntyre: This relates to negotiations for additional bids which, of course, this company, as is noted by that letter and by subsequent letters in the record, would not accede to the submission.

Mr. Withrow: The fact remains, and that document shows, that the State did examine the books and records of the Medusa Company for the purpose of ascertaining what Medusa's costs were as a part of this negotiation, and now if it is material and relevant for the Commission to put in that by this document,—the figure which the State found,—it is also material and relevant for Medusa to go in and explain whether that figure is a correct figure, and to go behind the point as to whether or not Medusa was justified from a cost standpoint on standing on its original bid. Now, leaving that organization in,—

40125 and the are other letters, a few other letters on it,—puts in issue the whole fairness of the price.

Mr. MacIntyre: We do not believe that that exhibit puts into issue the fairness of price in so far as the fairness of

price is related to costs, profits, or losses, and it may, so far as we are concerned, be considered as being limited, as not putting into issue the question of fairness of price in its relationship to costs, profits, or losses.

Trial Examiner Norwood: Well, it is urged that it remain in to show that these Respondents, after having the situation opened up by the State, did consult together about it and decide that they would not meet the State demand; is that it?

Mr. MacIntyre: That they would not recede from the position of the identically delivered price quotations which had therefore been made.

Mr. Withrow: Your Honor, Mr. MacIntyre,—I do not know whether it is deliberate or otherwise,—misstates the situation. Medusa Company quoted certain prices, quoted its going commercial prices to the State. The State then attempted, or asked Medusa Company: "We would like to find out if those are fair and reasonable prices. Will you open your books so that we can see?" The State went to the Medusa office with auditors and accountants to
40126 find out from the books, the cost records, and cost data of the company whether or not the Medusa price was fair. Then, we have a memorandum which incorporates some of the information as to what they found on the Medusa books. Now, as a result of that cost survey, the Medusa Company decided that as far as it was concerned that its prices were the prices that it wanted to quote, and are fair and reasonable, and did not want to recede from the going commercial prices which Medusa had quoted. It had nothing to do with identically delivered prices whatsoever.

If the document is left in, however, the Medusa Company is called on to meet by specific cost proof that document and justify why the level of commercial prices which it quoted.

Mr. MacIntyre: If Your Honor please, I do not see how that is true when we have agreed to the limitation of the document as not showing anything concerning the fairness of price, in so far as that fairness has any relationship to costs, profits, or losses. Why do they have to meet something that is not in issue through the exhibit?

Trial Examiner Norwood: Well, I think that I will allow the motion to strike that particular document. It

appeared at the time it was received that fairness
40127 of price was to be brought in here as establishing one symptom of monopoly through the high prices, but that is out of this case. So I shall allow the motion to strike Commission's Exhibit 2762-A to E.

40132 P. G. DAWSON thereupon resumed the stand and testified further as follows:

Direct Examination by Mr. Withrow (Continued).

40149 Mr. MacIntyre: If Your Honor please, on that last question that was raised by Mr. Withrow, as to
40150 what we assume, he is erroneous to assume that we assume something. We have never assumed, contended, or charged that they receive on the day that they make a price advance the full effect of it. That is a thing of their own device and making, that they contend, and they stand by it or lose by it, and that is not in issue.

40154 Q. Mr. Dawson, there was some statement in the record to the effect that Manitowoc, or shipments from the Manitowoc mill, net 7½; around 7½ or 4 cents per barrel, on shipments by boat over what they would net on shipments by rail to Chicago and Milwaukee markets. Are you familiar with this question of boat shipments
40155 from Manitowoc to those markets?

A. Yes.

Q. And from your experience are those figures of around 7½ cents and 4 cents the difference between rail and boat rates on shipments?

A. I do not know about the fractions, but it is approximately correct.

Q. Now are there any additional expenses in connection with the shipment by boat from Manitowoc to those markets as against shipment by rail?

A. Why, there are some additional expenses, yes.

Q. What are they, Mr. Dawson?

A. We have the additional investment in silos, depreciation on building and equipment, your overhead, such as taxes, insurance, and you have to maintain a certain crew, I should say packing and loading crew whether you have business coming in or not. Of course, at the plant we can always use that labor some place else.

Q. Now, would you tell us whether or not this
40156 added cost with reference to the silos exceed the difference between the boat and rail rate—that is, exceed 7½ and 4 cents, referred to in the record?

40158 A. After taking these expenses I have mentioned before, there is really no advantage in the freight differential.

40170 The witness identified Resp. Exs. 3108 A-B, and 3109 A-B, as Medusa interoffice communications
40171 which refers to specific interpretations with reference to the application of sales policy, sales announcement broadcast to the trade late in February, 1935; Resp. Ex. 3110 A-B as a Medusa letter covering the same matter; Resp. Ex. 3110-C as a letter received from one of Medusa's dealers concerning this matter.

Mr. Withrow: Your Honor, I offer in evidence these documents just referred to by the witness, 3108, 3109, and 3110, with the appropriate sub-letters in each instance (handing the documents to Commission's Counsel).

40172 Mr. MacIntyre: We object to this pending offer on the ground that the documents are incompetent, irrelevant, and immaterial.

Trial Examiner Norwood: What are they?

Mr. MacIntyre: The writings of third parties and other parties not here as witnesses, self-serving, hearsay.

40174 Q. Mr. Dawson, I show you Respondents' Exhibits 3158-B, C, D, E, and F, and ask you if they are announcements of policy made by the Medusa Company?

40175 A. Why, Respondents' Exhibit No. 3158-D, E, and F are printed announcements of change of policy. Respondents' Exhibit 3158-B and C are typewritten copies.

By Mr. Withrow:

Q. I show you and ask you if Respondents' Exhibit 3158 is a summary prepared in the Medusa office of the announcements of marketing plans and policies which they broadcast to the trade, of which "B" through "F" are copies?

A. Yes, it appears to be.

Q. Well, this Respondents' Exhibit 3158-A, that was prepared in the office of the Medusa Company?

A. Yes.

40181 (RESP. EX. 3158-A to 3158-F was offered and received in evidence.)

40182 Mr. Withrow: And at the same time I would like to ask Your Honor to reconsider your ruling on 3108, 3109, and 3110, in view of the fact that the policy referred to in those documents has just been received in evidence, and those are interpretations and expansions of the sales policy of the company.

Trial Examiner Norwood: Motion denied. I think the policy and any explanation this witness can give would be sufficient.

40183 By Mr. Withrow:

Q. Mr. Dawson, I would like to direct your attention to Respondents' Exhibit 3158-E, to the paragraph about sales to commercial concrete products companies being sold direct. Would you tell us whether, as a matter of practice, the Medusa Company always sold concrete products companies direct?

A. Not in all cases.

Q. Well, were there any particular markets that you can recall, ~~if you can recall any,~~ where you sold them through dealers instead of selling them direct?

A. It is my recollection that in Cincinnati we sold that account through a dealer.

Q. In other words, that statement of policy was just a general statement which you deviated from?

A. That is right.

40184 Q. Would you tell us, Mr. Dawson, if you know whether or not in Allegheny County you had a practice similar to the practice in Cincinnati or selling concrete through dealears instead of direct?

40185 A. There was a proposal came in from the district sales manager in the Pittsburgh office to continue the sale to ready-mix plants through dealers. I am not certain, however, at this time, whether or not we actually put it into force or whether we sold them direct.

By Mr. Withrow:

Q. I show you Respondents' Exhibit 3109-A, and ask you if it refreshes your recollection as to what action Medusa Company took?

Mr. MacIntyre: I object. It is a paper that has been excluded from evidence on the ground that it is incompetent, irrelevant, and immaterial, and if is not a writing by the witness.

Trial Examiner Norwood: Did the witness have anything to do with this paper?

Have you?

The Witness: Not directly. It is a letter from our general sales manager, to the district sales manager in Pittsburgh.

Trial Examiner Norwood: Well, did it come to your attention at the time it was issued?

The Witness: There was discussion. I do not know that I have seen the letter before except as an exhibit here today, but I remember the discussion in the office.

40186 Trial Examiner Norwood: Well, you tell us what you remember of the discussion. I do not think you need to refer to that paper, however.

The Witness: I have mentioned that already without glancing at this now, and without reading it. I do not recall whether or not ready-mix plants in Pittsburgh were sold direct or through a dealer.

40188 The witness identified Resp. Ex. 3117 A and B as interoffice memoranda between the sales office and the employees of Medusa. That is Mr. Mooney's signature on the "A" page.

40189 Q. And who are Mr. Hampshire and Mr. Neu?

A. Both salesmen in the Indiana territory.

Q. What was Mr. Mooney's position at that time?

A. He was, in 1936, district sales manager, Toledo office.

(RESP. EX. 3117-A and 3117-B was offered and received in evidence.)

40190 By Mr. Withrow:

Q. Do you recall whether or not the Medusa Company made any use of the Compendium, compiled by The Cement Institute?

A. Not to my recollection.

40192 The witness identified Resp. Ex. 3121 as a copy of a letter from A. T. McCormack, Medusa's general sales manager, sent to all the district offices, to the district sales managers of the district offices. He was familiar with the circumstances surrounding the announcement at the time it was made and it was made and sent in the regular course of Medusa's business.

40193 (RESP. EX. 3121 was offered and received in evidence.)

The witness identified Resp. Ex. 3122 as a price

announcement from the general office to the district offices of Medusa and prepared in the regular course of business; Resp. Ex. 3124 A as a letter advising the general sales manager, Mr. McCormack, that a warehouse is now available to distribute cement in Pittsburgh. The wit-
ness does not think this could be considered an an-
40194 nouncement to the trade. He doubts that a copy of
that was sent to the trade because it is just a letter between the district sales manager and the sales manager.

The witness identified Resp. Ex. 3123 A as a quotation to the trade naming destination prices on about twenty points in Pittsburgh and in the vicinity of Pittsburgh; Resp. 3124 B as a quotation form which had been developed for the purpose of announcing a system or
40195 policy or trucking. It is not a regular form. He cannot identify "D, E and F" as being accompanied by Resp. Ex. 3124 B, "what was mailed—". He is inclined to believe that this is merely an office record for office guidance.

The witness identified Resp. Ex. 3125 as an announcement sent out to the trade by Medusa. The handwriting appearing in the lower left hand corner is that of a party by the name of Bert Korey. He thinks that Bert Korey was chief clerk at the time in the general sales department, Cleveland office. The witness identified Resp. Ex.
3126 A and B, and Resp. Ex. 3127 A and B as an-
40196 nouncement which he sent to the trade. He believes
that the handwriting appearing in the upper left hand corner of these documents while not initialed, is that of Mr. Korey. He cannot identify Resp. Ex. 3128-A with the date, December 1932. His attention being brought to Resp. Ex. 3128-B, it helped him to identify "that." The date is December 12, 1932 and these [Resp. Ex. 3128-A to H] and forms used by the Manitowoc Company.

The witness identified Resp. Ex. 3129 A and B as a quotation form bearing Mr. Korey's handwriting and used in December 1932 by Medusa in broadcasting quotations to dealers in Cuyahoga County; Resp. Ex. 3130-A to C as the form used in broadcasting quotations to Cuyahoga
County dealers in August 1933. There is a pencil
40197 date on here. He will have to assume that unless
there is some other identifying date. It is the practice of Medusa to keep new quotation forms in a price file indicating the territory to which the quotation is sent. Resp.

Ex. 3130 A to C is a copy of the form. He thinks the typewritten and mimeographed material at the bottom of Resp. Ex. 3130 C is to meet a special situation or a price at several points a short distance from Cleveland. He thinks that the information contained in the quotation sent to the dealer is part of the general price record and that this price appeared on the quotations going to the dealers in other communities.

40198 The witness identified Resp. Exs. 3131, 3133 and 3136 as announcements sent out by Medusa to the dealer located at the points or in the counties written on the blank form; Resp. Ex. 3132 A and B as an announcement of the Manitowoc Company; Resp. Exs. 3134 and 3135 as copies of the form letter sent by Medusa to the dealers indicated on the documents. In addition to dealers, on Resp. Ex. 3134, it was also sent to two of Medusa's plant superintendents.

Mr. Withrow: Your Honor, I offer in evidence at this time Respondent's Exhibits 3122 through 3136, and I think without checking that that is all inclusive (handling the documents to Commission's Counsel).

40199 *Examination on Voir Dire by Mr. MacIntyre:*

Q. Mr. Dawson, referring to Respondents' Exhibits, for identification, 3132-A and 3128-A to G, can you tell me whether or not the deliveries to the trucks as indicated in those papers by the Manitowoc Company were at the delivered prices in the town where the deliveries to the truck were made, whether it was in Manitowoc or elsewhere?

Mr. Withrow: Your honor, I object to the question. It is not voir dire examination. It has nothing to do with the admissibility or relevancy or materiality of the documents. It is cross-examination, and that is all.

Trial Examiner Norwood: It might have a little to do with the relevancy.

Mr. MacIntyre: It has.

Trial Examiner Norwood: Objection overruled.

A. 3132-A covers deliveries from the Milwaukee silo.

By Mr. MacIntyre:

Q. At the Milwaukee delivered price?

A. At the Milwaukee delivered price.

Q. Now, what about the—

A. Although the price is not mentioned in here.
40200 It is merely—there is no provision—this not a quotation; it is merely an announcement.

Q. Yes, but I mean as to the policy provided for delivered price in Milwaukee.

A. That is right. There was a time in 1935, it is my recollection, that we delivered to the dealer's warehouse, or the dealer could come in and pick the cement up at the silo.

Q. At the delivered price at Milwaukee?

A. At the delivered price, yes.

Mr. Withrow: When you say "we delivered to the dealer's warehouse," you mean by truck or by rail?

The Witness: By truck. It is a truck announcement.

By Mr. MacIntyre:

Q. Now, as to 3128-A to G, is that on a similar basis that those deliveries were to be made?

A. 3128-A, the quotation, former quotation used in quoting on carload lots, f.o.b. cars destination, or f.o.b. their truck at our mill.

Q. At the delivered price quotation in that town?

A. At the delivered price, destination delivered price.

Q. That goes for that set of announcements of December, 1931?

A. I think these are duplicates.

Q. I thought so. They were the same date.

A. Yes. Well, with the exception of the last one.
40201 Wait a minute. They are not duplicates.

Q. Well, they all provide for that method of pricing as to truck deliveries, do they not?

A. No. 3128-G is strictly carload.

Q. But those that do provide for carload deliveries or deliveries to truckloads are as you specified for 3128-A; is that correct?

A. I just want to make sure.

3128-E refers to quotation in car lots f.o.b. destination that is, f.o.b. cars destination, and the loading of trucks at our Milwaukee silo at the destination price.

3128-G is a former quotation used for mixed cars of standard gray cement and our other special products to a destination price, as f.o.b. cars at destination.

Mr. MacIntyre: Now, if Your Honor please, we object to 3128-A to G, 3132-A, 3123-A, 3124-A, 3124-B, F, D, E, 3127-A, 3126-A, 3129-A, 3130-A, C, 3131, 3133, 3134,

3135, and 3136, being irrelevant and immaterial. They do not go to any issue in the case, since they describe quotations for truck delivery at railroad car delivered prices at destination.

40202 As to 3122, we object to it as incompetent, irrelevant, and immaterial.

Mr. Withrow: I do not know what policy is stated in the complaint.

I am offering this to show when this company announced its various policies, and I am a bit at a loss to understand how Mr. MacIntyre could think that there is a great deal of difference between selling in Milwaukee at a delivered price and saying, "Come to the silo and we will sell it to you at the same price," or saying the reverse, say-
40203 ing, "Medusa had a price at Milwaukee, and if you want it delivered, we will deliver it free." It comes to the same thing, as far as I can see.

Trial Examiner Norwood: But that silo price was the delivered price.

Mr. Withrow: But there was a price at Milwaukee, and that is where prices radiated from, from the silo at Milwaukee. So it is a silo price, and if you want it delivered at Milwaukee, you can have it delivered at Milwaukee as an added service.

Now, to always look at this from the Commission's angle, namely, that we never have f.o.b. mill prices, you reach Mr. MacIntyre's conclusion; but if you want to look at it the way you would ordinarily in business; in other words, if you come to the store, you pay $2, "but we will also deliver it to you for $2." It is the same thing.

Trial Examiner Norwood: Objection sustained.

40205 Trial Examiner Norwood: The ruling stands.

40209 The witness identified Resp. Exs. 140 through 3150 as interoffice communications of Medusa concerning certain price changes and variations.

40211 Mr. MacIntyre: As to all of the other exhibits in this offer, we object as irrelevant, incompetent, and immaterial except Respondents' Exhibit 3138, Respondents' Exhibit 3139, Respondents' Exhibit 3151-A, B, C, D, E, F, and G. We contend that those are in exactly the same class as the ones you have rejected, and they are therefore irrelevant and immaterial, going only to delivered prices when deliveries are made by trucks, and I want to, on the record at this time, ask that Respondents'

Counsel keep those available for call by the Commission if they are rejected.

40213 Trial Examiner Norwood: I do not see how that throws any light on this. I shall sustain the objection to all but Respondents' Exhibit 3142.

(RESP. EX. 3142 was offered and received in evidence.)

40216 Respondents' Exhibit 3148-A was offered to show that the Lone Star Company attempted to increase prices out in the territory surrounding York, Pa., that the Medusa Company did not follow the increase and continued to sell at its previously quoted prices which were lower.

40217 Trial Examiner Norwood: Counsel has them marked for identification. He may show them to the Commission, set them out in his brief.

The objection is sustained to all except Respondents' Exhibit 3142, which is now received in evidence.

40218 The witness identified Resp. Ex. 3155 A as an announcement by Manitowoc Company of the discontinuance of trucking service in the Upper Peninsula of Michigan; Resp. Ex. 3155 C as a letter from Mr. McCormack, general sales manager, to Mr. Schwaab, district sales manager at Manitowoc, referring to possibilities of truck distribution, combination of truck distribution and warehousing and delivery by boat for the trade in the Upper Peninsula; Resp. Ex. 3155 D as dealing with the subject of truck distribution in the Upper Peninsula; Pet. Ex. 3155 F as a schedule showing various destinations in the Upper Peninsula of Michigan and bordertowns along the Wisconsin-Michigan border, showing prices, boat rate, truck rate, warehousing charge, and mill net stripped. That was an enclosure in Resp. Ex. 3155 D. That is part of Resp. Ex. 3155 D with reference to trucking in the Upper Peninsula of Michigan. The file starting with "B" relates to the background of Medusa's decision to make its announcement, Resp. Ex. 3155 A. As

40219 the mail comes in it goes through the mailing department and they open the mail. It is stamped, that is when it is received in the Cleveland office.

(RESP. EX. 3155-A to 3155-I was offered and received in evidence.

By Mr. Withrow:

Q. Now, Mr. Dawson, with reference to Respondents'

Exhibit 3155-A to H, this announcement that it
40220 would not truck in the Upper Peninsula of Michigan, was that entered into by an agreement, or was that announcement made as the result of any agreement with your competitors?

A. It was not.

Q. And had the Manitowoc Company trucked a large amount of cement from Manitowoc to the Upper Peninsula of Michigan prior to that announcement?

A. I would not say a large amount. It trucked some.

40231 Now, can you tell us what the practice has been since the N.R.A. Code period with reference to whether or not in the event of a reduction in price you have re-invoiced shipments made at the higher price in the event of a decrease?

A. Yes, in the event of a decrease in price we usually recognize that the dealer did not receive the shipment, and we go back five days and make corrections.

40232 Washington, D. C., —
Wednesday, June 5, 1940.

40233 P. G. DAWSON thereupon resumed the stand and testified further as follows:

Direct Examination (continued) by Mr. Withrow.

Q. Mr. Dawson, when we adjourned yesterday afternoon for the day I believe we were talking about the price in Cleveland. We fixed three dates during the period from January 1, 1936, until September 30 of 1937 when there had been changes in Medusa's delivered price in Cleveland.

40234 Q. I will show you Respondents' Exhibit 3068, for identification, and ask you to tell us whether you can refresh your recollection as to what the price in Cleveland was in cloth early in January—that is, January 1, 2, or 3, 1936.

A. $2.16 a barrel.

Mr. MacIntyre: May I have the first part of that question.

(Question read.)

By Mr. Withrow:

Q. That is the price quoted and at which sales were made by the Medusa Company, is it not, Mr. Dawson?

A. That is true.

Q. And you testified that there was an increase on January 8, 1936. I do not know whether the record shows how much it was, but I will show you Respondents' Exhibit 3073, for identification, and refer you to the second page, and ask you from that if you can refresh your recollection as to what Medusa's price in paper was following that change on January 8th?

A. The paper price is $2.06, as shown on this exhibit.

Q. And the Medusa price in cloth would be how much more?

A. Twenty-five cents a barrel more.

Q. Making $2.31?

A. Correct.

Q. And you testified that on January 1, 1937, there was a change in—a reduction in your price, and I will
40235 show you Respondent's Exhibit 3080, for identification, and direct your attention to the second page, and ask you if this refreshes your recollection as to what the cloth price quoted by the Medusa was in Cleveland on January 1, 1937, and following?

A. The cloth price is $2.30.

Q. And then you testified that the Medusa Company found on September 27th a reduction in the delivered price quoted by a competitor, and that Medusa immediately reduced its price and re-invoiced some of its shipments back five days. I would like to show you Respondents' Exhibit 3088, and direct your attention to page 256, and ask you if this refreshes your recollection as to at what price Medusa was selling cement in cloth subsequent to September 27, 1937?

A. $2.15 a barrel.

Q. Mr. Dawson, do you find or do you know of any instance where the dealers to whom you sell, say, in Richmond, Va., compete on the same—for the same job as the dealer you sell in Indianapolis, Ind.?

A. No, they do not compete for the same job.

Mr. Withrow: Now, Your Honor, I have no desire to go down a long list of names of towns here where the Commission has put in evidence showing that the Medusa Company sold, and if Counsel for the Commission is willing to

concede that the dealers located at the various town which I will list do not come in competition with each
40236 other, I won't go down that list. These towns are as follows:

Richmond, Va., Indianapolis, Angola, and Fort Wayne, Ind.;

Toledo, Cleveland, Youngstown, Portsmouth, Akron, and Painesville, Ohio;

Monroe, Grand Rapids, Detroit, Saginaw, Kalamazoo, Jackson, Port Huron, and Muskegon, Mich.;

Bloomington, Pekin, Springfield, Kankake, Quincy, Salem, Dixon, Freeport, Wheaton, and Cairo, Ill.

Erie, Pittsburgh, York, and Westview, Pa.;

Syracure, Poughkeepsie, Albany, and Binghainton, N. Y.;

Asheville, N. C., Washington, D. C., Baltimore, Cumberland, and Annapolis, Md.;

Wheeling, W. Va.; New London, Conn.; Springfield, Mass.; Providence, R. I.; and Louisville, Ky..

If Counsel for the Commission is willing to concede that, I won't go into a long line of questions because it not only involves whether the dealer sold by Medusa in Richmond, Va., would compete with a dealer in each one of those other towns, but whether a dealer in each of those other towns would compete with the entire list, so that we might, by going through the routine, spend a great deal of time.

40237 Trial Examiner Norwood: You are saying that the dealers in the towns you name do not compete with each other?

Mr. Withrow: That is right.

Mr. MacIntyre: If Your Honor please, of course we would object to the questions being put to the witness. We do not think he is competent to testify on those matters because he could only state his beliefs according to the information we have. However, in order to shorten the proceedings and save time, we will make this concession to Respondents' Counsel, that under the policies of the cement manufacturers, including the company represented by this witness, of their making sales to dealers, the dealers in those towns named by Mr. Withrow do not compete with each other.

Trial Examiner Norwood: Is that satisfactory?

Mr. Withrow: Could I have the statement read, starting with "under those policies"?

Trial Examiner Norwood: Yes. Read it.
Mr. Withrow: Or, we will concede that—
(Statement by Mr. MacIntyre read.)
Mr. MacIntyre: In their respective towns, we will add.
Mr. Withrow: Well, if Mr. MacIntyre is going to add
that last qualification, the concession is not satis-
40238 factory. I mean the question as to whether they
come into competiton with each other. If he is going to limit, say that an Indianapolis dealer does not compete in Richmond, Va., with the Richmond, Va., dealer, that is not satisfactory. Presmuably they could come into competition at any place in between, or even beyond.
Now, if Mr. MacIntyre would strike that last phrase, the concession would be satisfactory, as far as this Respondent is concerned.
40241 Trial Examiner Norwood: Read his offer there, and let us see if the Counsel agrees to it. If not, I am going to have to ask you to proceed to ask the witness what he knows about the competition as between dealers in those various towns.
(Mr. MacIntyre's statement was read.)
Mr. MacIntyre: Now, if Your Honor please, Mr. Withrow wants to attempt through this witness to show that the dealers in Washington do not compete or attempt to compete, I would say, with the dealers in Baltimore for business half way between All right. Let him try it. But I have stated that the Baltimore dealers do not compete with the
Washington dealers under the policies generally in
40242 Washington or Baltimore. Now, let him go to the mid towns, if he wants to.
Mr. Withrow: I do not care what Mr. MacIntyre wants to argue. It makes no difference to me how we put this evidence in, but whether the Commission is going to waive any such point, if there is a point—I do not think there is—but Mr. MacIntyre apparently thinks it is so important that we have had several orations about it, but we either are going to have some concession or we are going to get what proof we can from Mr. Dawson and we are going to go on and supplement that proof by the proof that is necessary.
Trial Examiner Norwood: If that concession is not satisfactory I will ask the Counsel to proceed with the examination.
Mr. Withrow: If Counsel for the Commission is willing

to concede that they will not argue or use for any purpose before the Examiner, before the Commission, or before the courts, the facts or any inference from the facts that dealers
40243 located at the towns for which invoices have been received in this record, when offered by either side, come into competition with each other when shipments are made to the respective towns where the dealers are located, we will desist from this line of inquiry, but I think we will have saved a great deal of time. Now, you can make that concession.

Mr. MacIntyre: Now, if Your Honor please, the concession that I have made went to the point of the questions asked the witness by Mr. Withrow, and we feel that it is the concession called for by his question. We do not concede what he has asked for in his request.

Mr. Withrow: Could you have that last statement read?

Trial Examiner Norwood: I think it is admitted by the Commission that there is not any competition as between dealers at the various points in their respective towns—or did you say localities?

Mr. MacIntyre: I used the word "towns," I believe.

Trial Examiner Norwood: Yes. In their respective towns. They have admitted that, so if Counsel wants
40244 to prove anything further as to competition at points between the various towns, he may proceed.

Mr. Withrow: There is one thing that I want to make clear, if it is not clear in my concession. I am afraid other people not being here might misinterpret. I did not mean to say dealers in the same town were not in competition with each other, but I meant a dealer in one town, that the Commission would not argue about the fact that competition between a dealer in one town with a dealer in another town, the dealers being on the list of invoices in between.

Trial Examiner Norwood: I think that is clear.

Mr. Withrow: Now—

Trial Examiner Norwood: Mr. MacIntyre, what time does your concession cover?

Mr. MacIntyre: It most certainly covers all periods since 1935 and since the dates previous to then when the Respondents in this case adopted the policies of selling to dealers only in towns where they had warehouse facilities.

By Mr. Withrow:

40253 Q. Mr. Dawson, I show you Respondents' Exhibit 3120-A to H, and ask you to tell us what it is?

A. Respondents'

40254 The witness identified Resp. Ex. 3120-D as a report dated August 25, 1931 by Medusa salesman D. E. Brown, on the subject of trucking; Resp. Ex. 3120-H as a letter dated June 24, 1935 by A. J. Rooney, of Huron, and directed to Gibsonburg Coal & Ice Company.

40255 H. R. Muston who is a Medusa Salesman in the Ohio territory put his name under it.

40258 Mr. MacIntyre: Now, if Your Honor please, I want to say that we object to Respondents' Exhibit 3120-H. It shows nothing in the world but an announcement by the Huron Company that it adopted as of that date, the policy as is shown there of selling on a de-

40259 livered price basis for truck delivery under the other conditions that are therein described. The record already shows that, and if it did not it would be irrelevant and immaterial to show it.

40261 By Mr. Withrow:

Q. Now, Mr. Dawson, with reference to Respondents' Exhibit 3120-D, is that a report made in the regular course of business?

A. It is.

Q. And is it the regular course of business for Medusa's salesmen to make such reports?

A. Well, when they find any change of policy, as they learn it in the field, through the dealers, it is usually reported. It is their duty to do so.

40268 (RESP. EX. 3120-A to 3120-H was offered and received in evidence.)

40270 The witness identified Resp. Ex. 3164-A as a copy of a letter dated September 3, 1935, from E. S. Rogers, Jr. to A. R. Deal, District Sales Manager at York; Resp. Ex. 3164-B as an invitation to bid on U. S. Northeastern Penitentiary at Lewisburg, Pa.; Resp. Ex. 3164-B is attached to Resp. Ex. 3164-A.

40271 The material filled in on Resp. Ex. 3164-B is a copy of Medusa's bid.

(RESP. EX. 3164-A, 3164-B and 3164-C was offered and received in evidence.)

40272 The witness identified Resp. Ex. 3165-A as a copy of a letter dated May 29, 1939, which he wrote to the United States Department of Agriculture; Resp. Ex. 3165-B as relating to information on a bid to the Department of Agriculture, Bureau of Public Roads, on June 1,

1939; Resp. Ex. 3165-C and D as information pertaining to the same bid.

By Mr. Withrow:

Q. And is this an instance in which the Medusa Company bid an f.o.b. mill price to the Federal Government?

A. That is correct.

Trial Examiner Norwood: What is the date of those?

The Witness: May 29, 1939.

Mr. Withrow: Your Honor, I offer in evidence Respondents' Exhibit 3165-A to D.

Your Honor, in order to have one ruling on these, I will show the witness Respondens' Exhibit 3166 through 3177, and ask him to go through them and tell us whether or not these are papers relating—I mean, covering letters plus copies of bids which the Medusa Company gave f.o.b. mill bids to the Federal Government?

Trial Examiner Norwood: Now, was that later
40273 than July 2, 1937? All of them?

Mr. Withrow: Yes. On the theory that the Federal Trade Commission introduced evidence on the same subject subsequent to July, 1937.

40275 A. These all refer to the bids, and they are copies of bids contained in the exhibits.

By Mr. Withrow:

Q. Those are f.o.b. mill bids?

A. F.o.b. mill bids.

Q. By Medusa?

A. That is right.

Mr. Withrow: And I offer those in evidence with the document which Your Honor has—that would be Respondents' Exhibits 3166 through 3177, in addition to Respondents' Exhibit 3165.

Mr. MacIntyre: The objection as stated to the others, on the same ground, that they post date the appearance of witnesses in the case who testified that the Federal Government had not been able to secure f.o.b. mill bids when requested prior to the—

Trial Examiner Norwood: Well, you state your grounds.

40276 You stated all that.

Now, the objection is sustained.

Now, I thought I had made it very clear about those. I do not see why Counsel need offer any more of them. If you have something relating to the Good Friday bids, or

any other bids subsequent to the complaint about which evidence has been received to show a continuation of a practice, we will receive those, but as to any other bids, you have numerous exceptions on that, and there is no use to spend any further time on preparing them or offering them or arguing about them or ruling on them.

40282 Mr. Withrow: Your Honor, in view of Your Honor's ruling rejecting the balance as cumulative, I will not have marked at this time this file of f.o.b. mill bids which include bids to the quartermaster's office, the C. C. C., the Department of Agriculture, the Department of the Interior, and other branches of the Federal Gov-

40283 ernment to whom the Medusa Company has made f.o.b. mill bids, with the statement that they would show that under conditions similar to the invitation just received, the Medusa Company has bid f.o.b. mill bids—made f.o.b. mill bids in other instances.

Mr. MacIntyre: And what are the date of those you are holding in your hand to which you make reference? We may have something in the way of a general statement to those. I think it would help us on the record.

Mr. Withrow: Well, they are subsequent to the date of the complaint, it still being our position that when we got requests on a satisfactory basis only for f.o.b. mill bids the Medusa Company made them.

Mr. MacIntyre: Are they subsequent to May 29, 1939?

Mr. Withrow: They are around and subsequent to the date of the Good Friday bids, Mr. MacIntyre. If you want to know more, we will have them marked and identify and offer them.

Trial Examiner Norwood: Well, I do not think it will be necessary to present them.

Proceed.

Mr. Withrow: I understand Your Honor would exclude these and I do not want to take the time.

Trial Examiner Norwood: As cumulative, yes.

40284 By Mr. Withrow:

Q Mr. Dawson, I show you Respondents' Exhibit 3180-A to F, and ask you if this is the contract entered into by the Medusa Company?

A. It is.

Q. And do Respondents' Exhibits 3179 and 3178 refer to the same transaction?

A. Yes.

Q. Is that an instance where the Medusa Company entered into a contract on an f.o.b. mill basis prior to July, 1937, or the Manitowoc, I should say?

A. Yes.

40285 *Examination on Voir Dire by Mr. MacIntyre.*

Q. Mr. Dawson, the points to which delivery or points of use of cement which you contracted to sell, as is shown by Respondents' Exhibit, for identification, 3180, are the points shown on Respondents' Exhibit 3178, for identification?

A. These are a few of the points.

Q. How many points additional to those?

A. Oh, I could not say offhand. There were a total of 425,000 barrels here.

Q. How many points?

A. I cannot answer that without going back to the record of shipments.

Q. How can the points at which the cement was to be used be determined from the papers that are now offered?

A. They cannot be determined from the papers offered here.

Q. Are you able to tell us on cross-examination anything about the points—that is, give us the names of the points and the prices quoted by your competitors' base, and so on?

A. Not from these exhibits here, no.

Q. Well, can you from your knowledge give us
40286 that information on cross-examination?

A. It depends on how far you want to go into it.

Q. Well, we will want, of course, the names of the points at which that cement was to be used and whether or not that the price you have indicated in your Respondents' Exhibit, for identification, 3178, was the controlling base price for each of those points; we want to be able to determine whether you can tell us that on cross-examination.

A. I cannot give you the points with what information I have here.

40287 Q. Well, from any of your knowledge, can you give us that information?

A. I know these points here that are mentioned in Respondents' Exhibit 3178, but I cannot—

Trial Examiner Norwood: Can you tell us whether the

f.o.b. mill figure there was arrived at by deducting the freight from the price at point of delivery?

The Witness: It was not. All the cement on this contract was delivered strictly f.o.b. plant.

Trial Examiner Norwood: Without regard to its destination?

The Witness: Correct.

By Mr. MacIntyre:

Q. Yet, you cannot tell us the delivery points to which it was expected to be delivered?

A. I cannot without the information from the office.

Q. Well, how can you tell us, then, that the price that you gave, which it purports to be f.o.b. mill, had no relationship to the so-called delivered price at those destinations?

40288 A. For the reason that the invoicing was done on the basis of f.o.b. plant regardless of where it went in the State of Wisconsin for highway construction work.

By Mr. MacIntyre:

Q. That is, you are talking about invoices now, not the bid?

A. Well, the bid, we invoice on the basis of the bid.

Trial Examiner Norwood: He is telling you how he knows that.

By Mr. MacIntyre:

Q. Now, can you tell us whether or not that the three or four points named on Respondents' Exhibit, for identification, 3178 were within the territory controlled by the Manitowoc base as of that date?

A. No, I cannot. Three of them I can say quite definitely are. Sherwood, I am not certain about. The fact of the matter is I do not recall what the Manitowoc base was at that time.

Q. You do not know it was 90 cents that is referred to in Respondents' Exhibit 3178?

40289 A. Oh, I know it was not.

Q. You know it was not 90 cents price?

A. That is correct.

Q. But you do not know what it was?

A. I do not recall.

Q. Well, if you do not know what it was, how can you say it was not 90 cents?

Mr. Withrow: Your Honor, I submit that this is cross-examination. It has nothing to do with the identification or the relevancy of the material offered.

Trial Examiner Norwood: I think he has gone far enough.

The objection is sustained.

Mr. MacIntyre: I submit it goes to the question of whether or not the papers offered show anything in the form of an f.o.b. mill bid as is claimed by Respondents' Counsel, and since we do not find ourselves at this point able to determine from either the documents or the voir dire examination of the witness that they are, in fact, f.o.b. mill prices, as claim by Respondents' Counsel, we will have to object to that as incompetent, irrelevant, and immaterial.

40290 (RESP. EXS. 3178, 3179, and 3180-A to 3180-F were offered and received in evidence.)

Direct Examination by Mr. Withrow (Continued).

Q. Mr. Dawson, I show you Respondent's Exhibit 3182-A to H, and ask you tell us if this is a bid of Medusa Portland Cement Comany?

A. It is.

40291 (RESP. EX. 3182-A to 3182-G was offered and received in evidence.)

40292 The witness identified Resp. Ex. 3183 (formerly marked Com. Ex. 819-U) as a copy of a letter writfen by the Manitowoc Portland Cement Company; Resp. Ex. 3183-B (formerly marked Com. Ex. 819-D) as a letter received by Medusa; Resp. Ex. 3183 C as a copy of a letter received by Mr. J. B. John of Medusa. The same applied to "D and E" of the same exhibit number. There is nothing on Resp. Ex. 3183 F (formerly marked Com. Ex. 882 E) that would indicate that it came to J. B. John. The handwriting in the upper right hand corner is J. B. John's initials but that is not J. B. John's

40293 handwriting; Resp. Ex. 3183 G (formerly marked Com. Ex. 880 F) as the original telegram sent to Mr. J. B. John; "H, I, and J" as copies of letters received by Mr. John; Resp. Ex. 3183 K (formerly marked Com. Ex. 949 F) and Resp. Ex. 3183 M (formerly marked Com. Ex. 949 G) as letters received by Medusa; Resp. Ex. 3183 P and Q (formerly marked Com. Ex. 949 B and C) as a

telegram received by Medusa; Resp. Ex. 3183 R and S (formerly marked Com. Ex. 949 J and K) as a letter received by Medusa. Resp. Ex. 3183 T, U, V, W, X, Y, Z, Z1, and Z 2 (Z being formerly marked Com. Ex. 819 C and Z1 and Z2 formerly marked Com. Ex. 545 3V and
40294 3W) as letters received by J. B. John, with the exception of "Z", which witness should have said is a copy of a letter written by Medusa; Resp. Ex. 3183 Z 3 (formerly marked Com. Ex. 546 2 N) as a copy of a letter written by Medusa; Resp. Ex. 3183 Z 4 as a copy of a letter written by Medusa; Resp. Ex. 3183 Z 5 as a letter received by Medusa from a dealer. "That" refers to the same matter as is contained in Resp. Ex. 3183 Z 4; Resp. Ex. 3183 Z 6 as an inter-office communication of Me-
40295 dusa; Resp. Ex. 3183 Z 8 as a copy of a general announcement sent to the trade by Medusa. This particular copy was sent to Mr. McCormack of Medusa.

The witness further identified Resp. Ex. 3183 Z 10 as an inter-office memorandum of the Medusa Company; Resp. Exs. 3183 Z 12, Z 13, Z 14, Z 15 and Z 16 as specified job contracts and contract forms entered into by the Me-
40296 dusa Company; and Resp. Ex. 3157 C through R as other specific job contract forms used by the Medusa Company, or its predecessor, the Sandusky Company, at the time indicated on the contract.

40305. (RESP. EXS. 3183 Z-3, 3183 Z-5 to 3183 Z-11, 3183-W, 3184, 3185, and 3186 were offered and received in evidence.)

40309 By Mr. Withrow:

Q. Mr. Dawson, this morning Mr. MacIntyre asked you whether the 90-cent f.o.b. contract prices for the State of Wisconsin were the same figure as your maximum mill net or your base at your Manitowoc mill, and you said they were not.

Do you recall at this time whether that base figure was higher or lower than 90 cents?

A. The base figure was higher.

Q. Was it substantially higher; say, 15 or 20 cents?

A. It is my recollection it was $1.13. I am just guessing, but that is my recollection.

Q. When you broadcast quotations to the trade, do you normally fill in the dealer's name on the quotation form?

A. Yes; we do.

Q. And would you tell us what your practice is, if

you attach an announcement to that quotation, do you also put the name of the dealer in the announcement?

A. No; it is not customary.

40312 *Cross-Examination by Mr. MacIntyre.*

40313 Q. Mr. Dawson, referring to Respondents' Exhibit, for identification, 3068, I believe you testified on direct examination, after referring to that, that the price quoted by Medusa early in January, 1936, in Cleveland, Ohio, in cloth, was $2.16 per barrel. Do you recall?

40314 Trial Examiner Norwood: Under the circumstances, I do not see any substance to the difference. I would like to ask the witness some questions.

I see on this Respondents' Exhibit 3070 the blank shows the terms, date, mill and routing. Does that indicate that the word "mill BB-1090-C"—.

The witness: That is right.

Trial Examiner Norwood: —does that indicate the mill from which it was shipped?

The Witness: "BB" in each case stands for Bay Bridge.

Trial Examiner Norwood: That means that you shipped it from the Bay Bridge, Ohio, plant?

40315 The Witness: That is correct.

Trial Examiner Norwood: And the initials refer to these plants that are already in the record?

The Witness: Yes, that is true.

Mr. MacIntyre: Will you please read the pending question to the witness?

(The question was read as follows:

"Q. Mr. Dawson, referring to Respondents' Exhibit, for identification, 3068, I believe you testified on direct examination, after referring to that, that the price quoted by Medusa early in January, 1936, in Cleveland,

40316 Ohio, in cloth, was $2.16 per barrel. Do you recall?")

A. Yes; I recall the $2.16.

By Mr. MacIntyre:

Q. When did Medusa undertake to quote $2.16, in cloth, for the first time, and when did it cease to so quote?

A. Without having the record of our price changes, I cannot answer that question.

Q. Can you tell me, from your examination of the

documents in that exhibit number, Respondents' 3068, for identification, on what date any of the sales were made; that is, the contract to make the shipment was made, by Medusa with its customer, which resulted in the shipments by those invoices?

A. The sale was evidently made some time before the shipment. That is only natural. To give you the dates, I would have to refer back to either the contract or the orders.

Q. You cannot determine that from the invoices, can you?

A. In the case of the contract shipments, we have a record of the contract number on the invoice.

Q. And you cannot tell the date of the contract from each invoice; can you?

A. No.

Trial Examiner Norwood: But do not the invoices cover various times that would indicate to you the dates on which a price had changed?

The Witness: There would not be anything on the 40317 invoice indicating the date of a price change. There are—

Trial Examiner Norwood: Well, it would indicate that price had been changed some time; that is, indicating that a changed price obtained on that date?

The Witness: It would indicate that on current business a new price would be reflected on the invoices.

By Mr. MacIntyre:

Q. As to a substantial portion of those invoices, they are shipments made under contracts; is that not correct?

A. They are both ways, both current business and contract business.

Q. But a substantial part of them are made on contract?

A. I couldn't say how much.

Q. You can examine them and tell us of quite a number of them are, can you not?

A. Yes; I have seen quite a few, and then, again, there are some that are not identified with contracts.

Q. Some?

A. Yes.

Q. Now, as to those, the shipments which were made under contract, can you tell us whether those contracts

were entered into one month, two months, five months, or twelve months previous to the date of the invoice?

A. Not from the records on the invoice?

40318 Q. And you cannot tell from the invoice at all?

A. No; this number does not mean anything to me here without having the records to tie it up with.

Q. And you cannot tell whether or not your delivered price quotations in Cleveland, that you were making on the day on which that shipment occurred under the contract, were the same as the price that prevailed on the day on which you entered into the contract, pursuant to which that shipment was made; can you?

A. You will have to repeat that question.

Trial Examiner Norwood: Read it.

(Question read.)

A. I still cannot get that question. If you mean that the contract price would not be the same as the price mentioned on the invoice, in here, that is correct.

Trial Examiner Norwood: The contract price at a given time might not be the going price, the price you quote to dealers?

The Witness: It might not be the price shown on the invoice for that particular contract.

By Mr. MacIntyre:

Q. That is because prices have changed, in many instances, between the date of the contract and the day on which this shipment was made?

A. That is right.

40319 Q. And that acounts for different delivered prices being shown on these invoices in these various exhibits, on different shipments on the same day?

A. That is true.

40320 Q. Mr. Dawson, can you determine from the information appearing on any of these invoices, in any

40321 of these exhibits numbered for identification as Respondents' Exhibits 3068 to 3088, inclusive, when the shipments are shown to have been made pursuant to contract, that the price shown in the invoice was the price quoted by Medusa to that customer, or any of its customers in Cleveland on that day."

The Witness: I did not get that. Will you read the question?

Trial Examiner Norwood: Yes; read it.

(Question read.)

A. No, I cannot.

By Mr. MacIntyre:

Q. And can you tell me from any of those invoices whether they show shipments under contract or otherwise—and I mean by "otherwise," its current business—and the dates on which price changes occurred in quotations issued by your company to its customers in Cleveland, Ohio?

A. If you trace back current business, and there was a change in price effective any particular day, the current price would be shown on the invoice.

Q. Now, referring again—

Trial Examiner Norwood: Do you mean the invoice would show the contract price?

The Witness: No.

Trial Examiner Norwood: The going price?

The Witness: No; I am talking about current
40322 prices now.

Trial Examiner Norwood: Yes.

The Witness: I am talking of a change in price. When that price became effective on a certain date, and we made delivery to a customer after the change of price, it would be reflected on the invoice.

Trial Examiner Norwood: If that would have reduced the price it would, would it not?

The Witness: Well, either way.

Trial Examiner Norwood: But if it were an increased price, and you were shipping on contract—

The Witness: I was talking about current business, Your Honor. We would get an immediate effect on current business.

Trial Examiner Norwood: Yes.

The Witness: On contract, the contract prices would apply in the case of an advance, and in the case of a reduction the revised price or the lesser price would be shown.

Trial Examiner Norwood: All right.

By Mr. MacIntyre:

Q. Your company gives the dealer the right to have shipments made for 15 days open market business at a price which was in effect, say, yesterday, even though it advanced today, and if the order was placed yesterday?

40323 Mr. Withrow: Your Honor, I object to this. It is all covered in the written sales policy which was offered, some of which was rejected. I do not think Counsel for the Commission should go into that. If it was not

material for us to complete the picture in that way, it certainly is not—

Trial Examiner Norwood: I think your sales policies are all in, are they not?

Mr. Withrow: I would like someone to point out where they are.

Trial Examiner Norwood: Objection overruled.

The Witness: What is that question?

Mr. MacIntyre: I will withdraw the question, since there is objection to it.

By Mr. MacIntyre:

Q. Mr. Dawson, I refer you again to Respondents' Exhibit, for identification, 3068, and ask you to select any invoice indicating a shipment on current orders, and give me the day on which the price changed to the level which is shown on the invoice?

40324 Trial Examiner Norwood: The objection is overruled.

Do you want the question read?

The Witness: No; I am just wondering how I can get that in the easiest way.

Mr. Withrow: Just take your time, Mr. Dawson.

Mr. MacIntyre: Let me find one for you there, Mr. Dawson, if it is going to take so much time for you to find one.

By Mr. MacIntyre:

Q. Referring you to page 56 in Respondents' Exhibit 3068, can you tell from that document when that price became effective, as is shown on there?

A. No.

Q. That is current business?

A. That is current business, yes; but there is nothing here to show that this $4.91 price on the paper was effective on January 16, 1936, or February 16, 1935.

Q. If you traced that back through earlier pages until you found some different price applied, you still could not tell, could you, since it is the policy of your company in granting dealers shipments at the old price before the price advance of 15 days for warehouse business?

40326 Trial Examiner Norwood: Can you not tell from one of these invoices whether an announced price was effective?

The Witness: Looking at an individual invoice, as Counsel has pointed out here, you cannot tell a thing about it, but you can trace back through all of these invoices and

determine when the price has changed, on a certain effective date.

By Mr. MacIntyre:

40327 Q. If one dealer—

A. You can refer to one invoice there and see the price had changed.

Q. If one dealer had covered his warehouse requirements for the full 15 days, and another customer had not, and the price became effective on January 1st, say, of that year, then, on current business, the price to one dealer would be at one level and the price to one that did not cover would be at another level; would it not, Mr. Dawson?

Mr. Withrow: I object to the question as being speculative, if one customer had a contract covering 15-day shipments and one did not. The witness has testified as to that. This is merely speculative.

Trial Examiner Norwood: Objection overruled.

A. If a dealer covered on 15 days and another dealer did not cover on 15 days, naturally, the one that did not cover would not have the same price protection.

By Mr. MacIntyre:

Q. Even on current business; would he?

A. If he did not cover.

Q. And if he had covering contracts, there would still be a greater disparity in price?

A. That is so.

Q. It does not necessarily mean that your company on one of these days was quoting a different price to

40328 one dealer than to another in the City of Cleveland; does it?

A. Will you read the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. It depends upon the nature of the sale what the price would be.

By Mr. MacIntyre:

Q. Yes; but you cannot tell from those invoices whether it was quoting a different price to one than to another?

A. No.

Mr. Withrow: The same objection.

Trial Examiner Norwood: Overruled.

A. Not the individual invoices.

By Mr. MacIntyre:

Q. Or any group of them, because of what we have just

outlined as your company's policy of permitting one dealer to cover and not permitting the other one?

A. Yes.

A. It is optional with the dealer.

40829 Q. Well, since it is optional, and as long as some dealers exercise the option and some do not, you could not tell us any particular day as shown by the invoices, or any group of them, whether or not the one price shown to one dealer or another price shown to another accorded with the quoted prices of your company on that day; could you?

40830 A. If you trace back through those invoices far enough, you are bound to hit on a change of price. It might or might not be reflected on any one day.

By Mr. MacIntyre:

Q. Then, you could not even tell on what date it became effective or on what date it was announced, because of the optional character of coverage for warehouse business, extending for 15 days from the date of the announcement; could you, Mr. Dawson?

A. You can determine a change in price, and that change might be reflected over a period of ten or fifteen days. I will agree to that, but the invoices will reflect a change in price over a period.

Q. But you could not tell on what day it was announced or on what day it became effective, because of the optional character of the policy of your company in granting coverage to dealers?

Mr. Withrow: It am not going to make an objection, but I want to point out with respect to this period that it would be the day when the change took place, and we are willing to concede, and I have been trying to get Mr. MacIntyre to realize that nobody is pretending that from those invoices you can tell the precise minute when the Medusa Company changes quotations. Now, if it is something else he is asking about, I misunderstood it, but if that is 40831 all he is trying to get, I think we are wasting time.

Trial Examiner Norwood: As I understand it, you are introducing these invoices to show that you have sold at different prices on certain days, from the prices of your competitors?

Mr. Withrow: No, sir. I refer you back to what I said. I made no such statement. It was very explicit. I did not say that, and I am not offering to show that.

Trial Examiner Norwood: I was really asking a question.

Mr. Withrow: Yes? Well, originally, I did not state I was offering for that purpose. I will restate it now that I am not offering it for that purpose. I am offering it to show that either the Medusa Company quoted prices at the same date that other prices are quoted, or that it quoted prices different from its competitors. I am offering it for an entirely different purpose. I have the citation of it, but it takes about three pages.

Trial Examiner Norwood: I recall it. You stated that it was to show different conclusions from those which will be shown in these selected invoices that the Commission put in.

Mr. Withrow: No. I think Your Honor misinterpreted or misunderstood what I was attempting to state.

Mr. MacIntyre: If Your Honor please, I call to
40332 your attention Mr. Withrow's statement on page 40148 in the record of yesterday, as to his reason for offering these things. We raised an objection.

Mr. Withrow: I was in the middle of a statement, Mr. MacIntyre. I just wonder if I could not finish.

Trial Examiner Norwood: Yes; let him finish.

Mr. MacIntyre: Well, when his statement is completed I want to draw this to your attention.

Mr. Withrow: I made my original statement, which was a request for waiver of identification by Counsel for the Commission, on record page 40132, and I made my original statement as to the purpose of the offer on the record at page 40137 and there following, in answer to Your Honor's question:

"Well, for what purpose are they offered?"

My answer starts there, and Your Honor will recall that you and I had a number of statements back and forth, trying to elicit information to show the picture completely.

Trial Examiner Norwood: Will you let me have, off the record, the substance of your statement?

(There was a discussion off the record.)

Trial Examiner Norwood: Do you contend that these invoices throw any light on this?

Mr. Withrow: They throw light on the question
40333 of the price lag, Your Honor. It is because of those contracts that you have the price lag, and Mr. MacIntyre is going into a little more detail than I did in developing some of that picture.

Trial Examiner Norwood: Just how is that question of the price lag revelant?

Mr. Withrow: Well, it ties in with some of the economic testimony offered on behalf of the Commission as to so-called rigid prices or sticky prices, and it is a foundation for further testimony on that matter that this is being offered. This is merely fundamentally basic material, which I think the Commission and Your Honor would be interested in, when you have the complete picture. Further, Your Honor will realize and understand that we are making this offer of further testimony in good faith, and we propose to go ahead with it, and my understanding of the rules of law, both in courts and before the Commission, is that that is a sufficient undertaking to warrant their being received. If we do not make good on our showing naturally Your Honor would entertain a motion to strike.

Trial Examiner Norwood: Well, I am constrained to admit that. Now, there is a question pending?

Mr. MacIntyre: I said that when these speeches were completed, I would give you a statement of what
40334 our objection went to yesterday. If you will permit me now, I will be glad to do so.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: The core of our objection yesterday was that we could not tell from the statements made by Mr. Withrow and I could not today, from hearing this offer, what information on them he proposes to use. We told him yesterday we would gladly accept them, providing we had an opportunity to cross-examine on it, but we do not want to cross-examine on anything that is not to be included in there, and if we had known definitely what was to be included in that examination, we would not be today attempting to cross-examine on these documents, when we do not know whether he is going to use them or not. If we knew he was not going to use them, we would not want to use the time on cross-examination, but he refuses to tell us.

Let me refer you to the record on that point.

At line 21 of page 40137, Mr. Whitrow made this statement:

"They are offered as being basic data on which further evidence tending to show why this Respondent sells cement usually on a delivered-price basis—"

And Your Honor said: "How do they show that?"

Mr. Whitrow never made any reply on that, but
40335 he went on to state to show the extent of something else.

We do not know for what purpose they are offered; so while this witness is here, because you indicated that unless we did cross-examine on them now, we would not be permitted to cross-examine as to the tabulation on the invoices, but only on the invoices, themselves, and we are left at sea, as we do not know what his offer is. We have to examine on the basic data which is to be used as a basis for the tabulation, and we do not know what is to be included in the tabulation.

It is unnecessarily taking time, and that was the core of my objection yesterday, that it would unnecessarily take time on cross-examination, unless the man came back for cross-examination after we saw what they were offering. We still do not know at this moment what it is.

Mr. Withrow: I do not think there is any occasion to shout about this, and I thought the Examiner requested Counsel on both sides to refrain from making further statements as to what the purpose of Counsel was in offering documents, or in a line of inquiry.

In reference to those invoices, Counsel for the Respondents undertook to base relevant and material testimony on these, and to show that they are relevant and material in the future, and we believe we have made a sufficient statement to show that they are even relevant and ma-
40336 terial at the present time.

I would like to point out that the cross-examination so far on these documents has not been on the contents of the documents, which we said we were going to tabulate, but on what the documents did not contain, which, of course, we could not tabulate.

Mr. MacIntyre: Well, I suggest, if Your Honor please, that you permit us to defer cross-examination on these documents until we know what, from the documents, is to be offered in evidence.

Trial Examiner Norwood: All Counsel has to do is to show that they are relevant and material for some purpose. He may have other purposes, but I do not know about that. I do not want to make him disclose his entire theory about this, unless it is necessary for me to understand it.

Mr. MacIntyre: In that connection, unless we are to have cross-examination of this witness, or of someone who can be cross-examined on these documents at a later time, after the tabulation is offered, we would have to have a complete cross-examination on all possible information that they could tabulate from the documents, at this time, while this

witness is on the stand, and, of course, we object to the documents as being irrelevant and immaterial for any purpose in this case. They do not meet any issue.

40337 Mr. Withrow: We propose to tabulate the information on the front of these invoices, and not what does not appear on the invoices, and I suggest, if Mr. MacIntyre wants to cross-examine Mr. Dawson on the invoices, he proceed to cross-examine on what is on the documents, and not spend time on what is not on them.

Mr. MacIntyre: Depending on what the contracts mean.

Trial Examiner Norwood: You will have to go back to the condition surrounding the invoices, the conditions under which they have been made, and I think that is information that is necessary for me in order to rule on this.

We will take a five-minute recess.

(There was a short recess taken.)

Trial Examiner Norwood: Gentlemen, please come to order.

Proceed.

Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: If Your Honor please, in order to save time and to cut the cross-examination of this witness as short as possible, I am not going to cross-examine him further at this time on these 2,000 invoices or for the purpose of having him to interpret the significance of the

40338 information appearing on them.

I do, however, in not cross-examining further on them at this time expressly state that we are waiving no right to cross-examination of the proper parties on any of the matter that is received in evidence either in the form of these invoices or in the form of a tabulation based upon the invoices when it is received.

Trial Examiner Norwood: Now, you may go ahead and bring out all the information that you desire to, sir, along the lines that you have questioned him on showing what these invoices indicate. That may make it clearer to me as to whether they should be received at this time or later on.

Mr. MacIntyre: Well, may I proceed without so many long speeches interrupting me?

Trial Examiner Norwood: I shall ask the Counsel to let you proceed.

Mr. Withrow: There haven't been so many long speeches.

Mr. MacIntyre: The record shows.

Mr. Withrow: But I just want to make it clear on the record two things; first, we do not ask Mr. MacIntyre to waive anything about these invoices, I know we won't; and, second, I would like to have it understood that the basic objection which I have already made to Mr. Mac-
40339 Intyre's inquiry, or type of inqury heretofore on these invoices, be understood to apply to the remaining questions which he makes to them, and if there are any additional objections I will do my best to state them tersely and have them applied to the balance of his questions, if we can have that understanding.

Trial Examiner Norwood: Now, if you object to this asking any further—

Mr. Withrow: Oh, I did not object to him asking any further questions, but I object to him going into matters not appearing on the face of the invoices. I mean, it does not have anything to do with the invoices. It seems to me that does not help at all.

Trial Examiner Norwood: I think I should be inclined now, after the discussions, to exclude these invoices until it is made clear to me how they show what Counsel claims, and how he wishes to connect them up so as to convince me of their relevancy and materiality. Can't Counsel make a statement?

Mr. Withrow: Do I understand that—

Trial Examiner Norwood: Can't Counsel make me a statement tomorrow morning about that?

Mr. Withrow: Well, I do not propose, Your Honor, today, to make a final argument on behalf of the Respondents in any way.

40340 Trial Examiner Norwood: No, no.

Mr. Withrow: First of all, I am not the Counsel who would make it on behalf of the clients whom our firm represents.

Trial Examiner Norwood: I just want sufficient information to enable me to know.

Mr. Withrow: And we are offering those documents for the information contained on the face of them, and it is our contention that we have shown that they are relevant and material, and we have undertaken now, however, to present tabulations which connect up with these, and to have testimony based on it which is relevant and material, and I

would like also to urge now as an additional grounds of their being received in evidence the fact that there has been cross-examination based on the documents, and under the rules of law that waives objection and the documents should be received now because the objections by the Commission's Counsel have been waived by the procedure they followed.

On these grounds I press their admission into evidence.

Trial Examiner Norwood: I think all these questioning goes to the relevancy, not to the contents.

Mr. MacIntyre: In fact, if Your Honor please—

Trial Examiner Norwood: Proceed.

40341 Mr. MacIntyre: I am willing that the cross-examination to the point be stricken if the documents are excluded, because I consider it is in the nature of a voir dire on the documents.

Trial Examiner Norwood: Well, go ahead.

Mr. Withrow: I understand that the documents have been rejected?

Trial Examiner Norwood: There is not a ruling until I can read all the statements of the Counsel.

Mr. Withrow: That is all right.

Mr. MacIntyre: You are not excluding these documents now?

Trial Examiner Norwood: Not now.

By Mr. MacIntyre:

Q. Mr. Dawson, I would like to ask a further question or two on voir dire, then.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Mr. Dawson—

Mr. Withrow: We do not, Your Honor—we recognize this as voir dire. It is our understanding this is cross.

Trial Examiner Norwood: Proceed.

Mr. Withrow: I do not want to waive that point.

Trial Examiner Norwood: Proceed.

40342 By Mr. MacIntyre:

Q. Mr. Dawson, these documents show for the most part you prepay freight; is that correct? In fact, in practically all instances you paid freight—that is, prepaid freight into Cleveland?

Mr. Withrow: Your Honor, I object. The documents speak for themselves. They are the best evidence.

By Mr. MacIntyre:

Q. Is that correct?

Trial Examiner Norwood: The objection is overruled.

A. The major part of these invoices are for trucks, truck deliveries, and the trucking charges are prepaid.

By Mr. MacIntyre:

Q. By your company, and a delivered price charged the customer; is that correct?

A. Yes.

Q. Now, can you name any other city into which your company makes shipments of cement on a similar plan?

Mr. Withrow: Your Honor, I object. It is beyond the scope of direct.

Mr. MacIntyre: That is, up to July 2, 1937.

Trial Examiner Norwood: The objection is overruled.

A. Any other city, did you say?

By Mr. MacIntyre:

Q. Yes; or locality of any kind.

40343 A. Yes, Toledo.

Q. Any others?

A. Milwaukee.

Q. Any others?

A. Well, did you say subsequent to July?

Q. Previous to July 2, 1937.

A. Oh, previous. Practically all points within 100 miles of Manitowoc.

Q. Any other territories?

A. I do not recall just offhand.

Q. Well, except for the territories you have named previous to July 2, 1937, it was the policy of your company to make shipments by carload, by rail, and let them or require the buyer to pay the freight to the railroad company and you deducted that amount from the face of the invoice; is that true?

Mr. Withrow: Your Honor, I object. This subject of prepayment of freight, either truck or rail shipment, was not gone into on direct examination. It is beyond the scope of direct. If they open it up, of course they realize they are making Mr. Dawson their witness, and also broaden the scope of redirect.

Trial Examiner Norwood: Well, in case these are received—

Mr. Withrow: This has nothing to do with these invoices. He is now asking about rail shipments to

40344 other points than Cleveland.

Mr. MacIntyre: I am trying to find out what the

policy of the company in general is. They are only bringing in one city.

Mr. Withrow: That is not your question.

Would you have the question read? It has nothing to do with these invoices.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: The objection is overruled.

A. Yes. The dealer paid the freight on carload business in most cases. There were some cases of prepaid shipments to pre-pay stations.

By Mr. MacIntyre:

Q. They were just rare exceptions or few in number, I would say?

A. Very few.

Q. So, it was the general policy of your company to do just as you indicated in your answer; is that correct?

A. That is correct.

Q. In that respect, these invoices, approximately 2,000 in Respondents' Exhibits, for identification, 3068 to 3088, do not represent the general policy of your company?

A. Well, on that theory, if we find that our competitors are delivering into a certain market on a paid basis, 40345 paid freight basis,—speaking of trucking now, we do the same thing.

Q. But it was not generally the case that you found trucks previous to July 2, 1937?

A. Well, if we did find it, we met it.

Q. Yes, but you did not generally find it to be the case; did you?

A. Well, I do not know. If we found it, we met it.

Q. But except for the territories you specifically mentioned, you did not find it to be the case prior to July 2, 1937?

A. I will say the territories I mentioned, I think that is true, there were very few cases where we prepaid the freight.

Q. So in that respect these invoices are not representative of a practice of your company generally for the period shown by the invoices in prepaying freight?

Mr. Withrow: Your Honor, I object to that question. The invoices themselves are the best evidence of what they show, and I object to characterizing the contents of documents not in evidence. Furthermore, I object also because

this has gone beyond the scope of the direct examination as to a policy and practice not gone into on direct.

Trial Examiner Norwood: The objection is overruled.

The Witness: May I have the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, it is the practice of the company to pre-
40346 pay freight where we had to meet a competitive situation.

By Mr. MacIntyre:

Q. Yes, but these invoices, Respondents' Exhibits, for identification, 3068 to 3088, inclusive, show a policy of prepaying freight in Cleveland, which during that period was not indulged in by your company for the major part or for the general territory that it served?

A. That is true because we did not have the same conditions.

Q. So in that respect they are not representative of the policy of your company over its general territory for that period, is that correct?

A. It is our policy, as far as Cleveland is concerned.

Q. But I am talking about over the general policy.

A. I say, our policy is to meet competition in the general territory.

Q. But in doing so, you did not do what you did in Cleveland in that respect?

A. No, because we found a different condition in Cleveland—I mean in the general territory.

Q. And in that respect—

Mr. Withrow: Let him finish; let the witness finish his answer, Mr. MacIntyre.

By Mr. MacIntyre:

Q. Have you finished, Mr. Dawson?

Trial Examiner Norwood: I think he has finished.

40347 Mr. Withrow: In each instance in the last four questions Mr. MacIntyre has interrupted the answer.

Trial Examiner Norwood: Now, will the Counsel please leave that to me hereafter. I will try to pay more attention.

Mr. MacIntyre: I am trying to save time.

Mr. Withrow: I know, but you don't have to double time.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

Trial Examiner Norwood: On the record.

By Mr. MacIntyre:

Q. Have you completed your answer, Mr. Dawson?

A. I will see what he has here.

Will you read that answer?

(Answer read.)

A. You haven't got that right. We found a different condition than in the general territory.

By Mr. MacIntyre:

Q. From the one in Cleveland; is that correct?

A. The condition in Cleveland was different than it was in the general territory, speaking of all of our territory. That is the reason that we have this prepaid condition in—prepaid freight condition in Cleveland.

Q. And in that respect these invoices, Respond-
40348 ents' Exhibits 3068 to 3088, do not—I would say are not representative of the conditions that you faced at that time through your general territory?

A. That is true, but as far as Cleveland is concerned, you have the same method all the way through the period.

Q. Yes.

A. It is consistent.

Q. But I am talking about the general territory now, it is not representative of the general territory?

A. No.

Trial Examiner Norwood: I want to ask you if all these invoices represent the sale of your standard brand cement?

The Witness: You may find some cases where there are mixed cars or mixed deliveries, I should say.

Trial Examiner Norwood: What is this make here "Crescent"?

The Witness: Oh, that is just a brand.

Trial Examiner Norwood: That is a brand?

The Witness: Yes, that is Crescent.

Trial Examiner Norwood: Was that a special price brand?

The Witness: No. It is standard.

Trial Examiner Norwood: Where it is a special price brand, does the invoice show it?

40349 The Witness: You will find the amount and prices listed after the name shown on the invoice.

Trial Examiner Norwood: I see.

Mr. Withrow: May I ask a question to clear it up?

Trial Examiner Norwood: Yes.

Mr. Withrow: On the invoice there are special brands,

which we have ruled out of the case. Are these the special brands, gray Portland cement WPFD, Medusa white Portland cement, Medusa white Portland cement WPFD, Medusa mix, and Stonese T?

The Witness: Those are the specials.

By Mr. MacIntyre:

Q. Now, on this question of mixed cars, Mr. Dawson, in that connection I call your attention to page 138 of Respondents' Exhibit, for identification, 3074. Can you tell me whether or not that the fact that only three barrels of gray was in that shipment with one quarter of a barrel of Medusa Portland white cement had anything to do with the price that was charged on the gray standard Portland cement in that shipment?

A. No. They are both priced individually.

Q. Is that the same price that would have prevailed in that shipment had there been 132 barrels or a full truckload of 60 barrels?

A. I cannot answer that question, here.

Q. You cannot tell from the information—on the 40350 information, whether or not it would have varied if the load had been full, can you?

A. Right now I cannot reconcile that $2.06 price for the three barrels.

Q. You cannot tell us why that it is different from other prices of that period in Cleveland?

A. No.

Q. You cannot tell me whether or not your company does make a different price for mixed car—that is, per barrel, per mixed car, mixed truckload, and simply because it is shipped in a mixed truck or mixed car?

A. Our policy is not to have any differentiation in price on a mixed car or mixed truck.

Q. But you cannot account for the price that was charged on that car of cement in that particular shipment?

A. No, I cannot reconcile that price in that particular case.

Mr. MacIntyre: Now, if Your Honor please, on the basis of the examination with respect to that, it shows that when and if this is received in evidence we must have some recourse to a cross-examination that would interpret the information on the face of these invoices in its true significance. We cannot afford, without objection, to let these

go to you for consideration for admission into evidence with such uncertainties.

40351 Trial Examiner Norwood: Haven't you brought out all of this?

Mr. MacIntyre: The witness just does not know. We have no answer as to the significance of all these questions that I have put to him.

Mr. Withrow: I do not know whether Mr. MacIntyre has deliberately trapped the witness, or whether he has done it because of an error in his own computation, but the witness has testified, and Mr. MacIntyre well knows it, that if you take, for the Medusa Company, the price they quote in paper and add 25 cents, you get a cloth price. So that if you take the price of $2.06 and add 25 cents you get a price of $2.31, and the record now shows that, starting on January 8, 1936, and continuing until through and including December 31, 1936, there was a delivered price in cloth in Cleveland of $2.31, so I see nothing to reconcile about a price of $2.06 in paper.

Mr. MacIntyre: Mr. Withrow has been able to reconcile it, but the witness has not. I did not attempt to entrap. I just picked up the information, as anyone would, and asked him to interpret it for me. If the witness cannot interpret it, I do not know how we expect to get interpretations by simply looking at the document.

The Witness: Well, I had a $2.16 price on the first invoice here, July 1, 1936.

40352 Mr. Withrow: Was that on a contract, Mr. Dawson?

The Witness: That is right; it is on a contract.

Mr. Withrow: And was the $2.06 on a spot shipment—I mean the one you looked at?

The Witness: That is a current spot shipment.

Trial Examiner Norwood: Now, how do these invoices—I will ask Mr. MacIntyre: How do these invoices differ from the invoices which you had put in?

Mr. MacIntyre: If Your Honor please, when the subpoenas left here for the invoices finally came in pursuant thereto, and we put it in the record, we secured what appears to be, and what we called for invoices only on current business, no contract invoices were called for, and we attempted to, wherever we could find them, eliminate them, so that we would get a current price as then quoted by the company on which the shipment was then being made, so that we could have a basis for comparing that

price with a price of a competitor in that particular market. These invoices now offered are so uncertain, so vague, so mixed up as to prices that it would confuse the record for them to go in as the witness has already told us that he cannot tell when any of these contract prices became effective because they do not carry the dates of the contracts which establish those prices for the shipments on contract shipments on shown by the invoice.

40353 Trial Examiner Norwood: Well, don't some of these contracts cover current business?

Mr. Withrow: No, the contract does not.

Trial Examiner Norwood: I beg your pardon. I mean some of the invoices cover current business?

Mr. Withrow: Of course Mr. MacIntyre gave a very able argument, I thought, for Respondents being allowed to complete the picture. He admitted that the Commission only put in a portion of the picture. I am inclined to stand on what he said.

There is another fundamental difference between the two offers, and that is his invoices only cover a period subsequent to the complaint.

Mr. MacIntyre: Now, Mr. Withrow raised that point yesterday, Your Honor, and I think we have a right and should be entitled to point out why we selected the period April, 1938, for invoices. We knew that the people of the Medusa Portland Cement Company, and all the other 74 Respondents, would be put to considerable more trouble to go to their storage warehouses and pick up invoices for the years 1935, 1936, or 1930, so we took something that we considered would be more or less current, and in their office records, so they would not have to go to an undue expense to get them.

Mr. Withrow: We are deeply touched at that

40354 consideration.

Trial Examiner Norwood: Now, go ahead. Proceed with your cross-examination. If you are through with this phase of it, you may go ahead with the other features, and I will reserve the ruling on this to give you my ruling the first thing tomorrow morning.

Mr. MacIntyre: I would say that we have completed the cross-examination on that until we know what your ruling is, but we will leave that subject at the moment and proceed to others.

Trial Examiner Norwood: Go ahead. If you can give me any further information about it, go ahead.

By Mr. MacIntyre:

Q. Mr. Dawson, referring to Respondents' Exhibit 3164-A, I believe you stated that Mr. E. S. Rogers, the writer of that letter, is in your office in Cleveland?

A. Yes, he is.

Q. And that was written to an assistant district sales manager, Mr. Diehl?

A. To a division or district sales manager, Diehl.

Q. In Pittsburgh?

A. No, in York.

Q. In York?

A. York, Pa.

Q. And can you tell me what he meant thereby 40355 the "and if you know"—by the use of the phrase "if this price is not correct"?

A. I am assuming that he meant if Mr. Diehl knew of a lower price other than we have here, Mr. Rogers wanted to know about it, or if there was any other price of that was different from the one mentioned in this letter he would like to know about it.

Q. He would have considered that any price different from the one that he asked him to bid would have been the correct price?

A. No, not necessarily.

Q. Well, what do you mean by saying that he meant—he wanted Mr. Diehl to tell him what other prices had been quoted?

A. Mr. Diehl is in charge of this particular territory, is much more familiar with the prices than Mr. Rogers is in the Cleveland office.

Q. S., when he asked him to tell him what the correct price was, he wanted him to tell him what the so-called going price for that location was; is that correct?

A. I would say that is correct.

Q. And do you know how the going price for that location as of that date was calculated by the person that made it?

Mr. Winthrow: Your Honor, I object until there is some evidence that the price was calculated. The record now shows that the Medusa Company had a file of delivered prices, and its statement is that its bids were pre-40356 pared from that file of delivered prices. There is no reference to calculation at all, and I object—have objected repeatedly to Mr. MacIntyre attempting to get into the record statements which are directly contrary to

any evidence in the record whatsoever. His questions should be based on something in the record.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is overruled. Go ahead.

A. I do not know whether it was calculated or not. I know it was the price, the last price we know of in that particular location.

By Mr. MacIntyre:

Q. Well I will use another question and I will not use the word "calculate."

Do you know how the person who made that price arrived at it?

A. Evidently picked it up by the salesman on quotations.

Q. From whom?

A. Well, I would not know where he got it; in fact, I—

Q. Well, the person that made the one that is picked up is the one I am attempting to find out now, how was that price arrived at?

Mr. Withrow: Your Honor, I object. For this 40337 witness to attempt to be asked how some other company made up a quotation which was picked up in the field I think is so speculative and so remote we should not take the time on it.

Trial Examiner Norwood: He asked him to tell him if he knew.

Mr. Withrow: Well, he did not ask him that, he did not ask him if he knew. The witness obviously stated he did not know.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Do you know how that price was arrived at?

The Witness: No, I do not know how it was arrived at.

By Mr. MacIntyre:

Q. But Mr. Rogers thought that that would be the correct price?

A. That is the last known price that he evidently had.

Q. You do not know but what it was the equivalent of ase price plus rail made to that destination, do you?

Mr. Withrow: Your Honor, I object. It is purely speculative.

Trial Examiner Norwood: The objection is overruled.

A. I said I do not know.

40358 By Mr. MacIntyre:

Q. You do not know?

A. No.

Q. Just before noon you testified that a group of what purported to be f.o.b. mill bids were made by your company about the middle of 1939, were typical of the bids submitted by your company to the Federal Government; do you recall?

Mr. Withrow: Your Honor, I object. There was no such testimony.

(Question read.)

Trial Examiner Norwood: Did you so testify?

The Witness: No, I identified the document, I believe, is all. I recall no testimony.

Mr. Withrow: He said that they were f.o.b. mill bids, nothing about "typical" at all.

Mr. MacIntyre: Well, either he did or Mr. Withrow made the statement. I just want to know which one is right.

By Mr. MacIntyre:

Q. Well, are they typical, in your estimation, Mr. Dawson?

Mr. Withrow: Your Honor, I object. The documents were excluded from the record, and I do not think they should be examined on, and if Counsel for the Commission insists on examining on them, I am going to insist

40359 that the balance of the f.o.b. mill bids be marked and offered and received.

Trial Examiner Norwood: He may ask if those which were received were typical.

Mr. Withrow: Well, that is not this question.

Trial Examiner Norwood: I think it is.

Mr. Withrow: No, it is not.

Mr. MacIntyre: Well, I will amend it to have that meaning.

Mr. Withrow: Let us have the question with that meaning.

(Record read.)

Mr. Withrow: One was received.

By Mr. MacIntyre:

Q. Well, is that a typical bid of your company, Mr. Dawson?

A. A typical bid?

Q. Yes.

A. Well, I would say that it has not been uncommon for us to bid f.o.b. mill.

Q. Well, does that bid represent a policy of your company to bid f.o.b. mill when requested to do so?

A. Not entirely.

Q. Well, what does it represent if it does not represent that policy?

A. We have bid to the Government f.o.b. mill at times.

40360 Q. At all times that they asked you to do so?

A. And we have bid destination.

Q. At all times they asked you to do so?

Mr. Withrow: Your Honor, I object to this going into matters subsequent to the date of the issuance of the complaint, and I again serve notice if any more questions are offered along this line other than about the bid received in evidence, we are going to insist that they all be marked and we are going to offer all of them.

40362 Q. Will you state, Mr. Dawson, that the f.o.b. mill bids that was offered in evidence by Mr. Withrow this morning, represents the policy of your company?

A. I think I have already answered that. We have received bids asking for—that is, we have received invitations asking for f.o.b. mill prices and also for destination prices. We prefer to use the destination price, but we have submitted bids on the f.o.b. mill basis.

Q. And on other instances you have refused to bid on f.o.b. mill when requested to do so; is that correct?

40363 A. What period are you referring to?

Q. Well, first, we will take the period covered by the bid that was received in evidence, which is, my recollection, around the middle of 1939.

40364 A. As I recall, during the 1939 period we were bidding quite often on the f.o.b. mill basis.

Q. Was it at that time the policy of your company to so bid whenever it was requested to do so?

A. I would not say it was our policy to bid every time we were requested to.

Q. Why didn't you bid in those cases where you failed to do so?

A. I have no knowledge of we failing to do it.

Q. Do you say you have no knowledge of failing to do

it in 1938, as well as no knowledge of your failing to do s in 1939?

A. Not entirely.

Q. Well, was it your policy to bid f.o.b. mill when requested to do so in 1938?

A. We have no policy against f.o.b. bidding—that is f.o.b. plant bidding. Sometimes we have and sometimes we have not, the policy is not set—I do not mean, set; is flexible.

40365 Q. If you have no policy against bidding f.o.b mill when requested to do so, why didn't your company bid on the invitation which is in evidence as Commission's Exhibit 1394?

A. I do not find anything on here that would indicate we were asked to bid.

Q. The record shows that one of those invitations was sent to your company and that you failed to respond.

40366 Q. Can you account for the showing in the record that your company did not respond to that invitation, Mr. Dawson?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. I do not recall this invitation at all, don't remember ever having seen it before.

By Mr. MacIntyre:

Q. Can you see any reason why your company should not bid on that invitation?

A. There would seem to be some unusual conditions in here that I have not seen in some other invitations.

Q. Any conditions in there that you think that should preclude your company from placing a bid?

40367 A. (Examining a document) Well, here is a case here that does not look so hot. This calls for deliveries in the States of Ohio and West Virginia as hereinafter specified, and I do not find any locations here where it is going to be delivered.

By Mr. MacIntyre:

Q. Well, if you were to be bidding f.o.b. mill, why is it necessary for you to know where it is to be delivered?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. For the reason that we sell dealers throughout West Virginia and Ohio, and some of the cement might be going

into localities where we are represented; we think the dealers should have consideration.

By Mr. MacIntyre:

Q. You would not want the Federal Government to buy from you f.o.b. mill and then use cement in a town where you got a dealer located?

40368 A. We want to protect our dealer as much as we can because the bulk of our business is through dealer channels.

Q. And you would refuse to bid f.o.b. mill to the Government in order to effect that result, would you?

A. Yes, we would.

Q. And that is what you did in this thing here?

A. I did not say that.

Q. Well, that would be one of the reasons for your not bidding in this quotation?

A. I said if we were asked to bid, and not know where the cement was going, the chances are we would ignore the bid, not bid.

Q. And have you noted in this invitation, Commission's Exhibit 1394, any other objectionable features?

Mr. Withrow: Same objection.

A. Well, that one was—

40369 Mr. MacIntyre: What?

A. That one thing there is enough.

Q. Have you noted any others as to why you should not bid on such invitations?

A. I have named one condition, that was sufficient. That is all I am looking for, is just one.

Q. Isn't that true of all f.o.b. mill bids, when you do not know the destination, Mr. Dawson?

A. I think you are spreading yourself pretty broad there, saying all f.o.b. mill bids.

Q. Well, if you are to bid f.o.b. mill to a customer, and especially the Federal Government, and do not know at the time where the Federal Government is to use the cement, that same objection that you just raised would apply; isn't that correct?

40370 Q. Is it your testimony, Mr. Dawson, that your company has no policy?

A. I said no set policy.

Q. Well, in so far as it has any policy, set or unset, has it been more liberal in its willingness to quote f.o.b. mill prices since July, 1937, than previously?

A. Prior to July, 1937, it is my recollection
practically all, if not all Government bids, had
for destination prices, or at least it was optional fo
company to bid destination or f.o.b.

Q. It is a fact that they asked for both f.o.b. mill
destination, isn't it, Mr. Dawson?

Mr. Withrow: Your Honor, I object. The invita
are the best evidence.

Trial Examiner Norwood: Overruled.

A. It was optional.

By Mr. MacIntyre:

Q. Isn't it a fact that they asked for both?

Mr. Withrow: Same objection.

A. I said a minute ago that the bids or the i
fations covered both points, but it was optiona
do not recall that the Government stated that
must bid both ways.

Q. But they asked for it both ways?

A. There was nothing compulsory about it.

Q. Well, whether it is compulsory or not, is it your
timony, Mr. Dawson, that they did not ask for them
ways?

A. No.

Q. Well, what is your testimony on the point?

A. My testimony is that they asked for a bid f.o.b.
they asked for a bid destination, but they did not ask
to bid both ways.

Q. Is it your testimony that they did not ask you to
both ways?

A. That is my testimony right now, unless I get in
nation or something to show me to change my mind
was optional, as far as we were concerned, whether we
f.o.b. or destination, and we selected destination.

Q. Well, I am anxious to know whether—what
know about this, without having to change your mind
want to know what your mind is now, and your mind
you testified?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Now, what about these requests that you rece
from, your company received from Governor Ho
or the State Highway Department of the Stat
Illinois in 1933 asking only for f.o.b. mill bids?

Trial Examiner Norwood: Did you receive such a request?

The Witness: I am not certain.

4037 Mr. Withrow: Mr. MacIntyre made a statement that they were invitations. I wonder if he would be considerate enough to tell Respondents' Counsel what the exhibit numbers are.

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. Is it your testimony, Mr. Dawson, that you do not know of your own knowledge—strike that.

Is it your testimony that you have no knowledge that the State of Illinois submitted an invitation to your company in 1933 asking your company to submit bids only on a basis of f.o.b. mill?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. I do not recall of my own knowledge to my own knowledge, I do not remember whether that bid was only f.o.b. plant.

By Mr. MacIntyre:

Q. If you have no knowledge on, that, do you have knowledge as to whether or customers and prospective customers, as of that period, also requested f.o.b. mill bids?

Mr. Withrow: Same objection.

A. What do you mean by "customers"? Do you mean dealers?

Q. Highway departments, Federal Government, contractors, dealers, or any of your customers.

A. Not in 1933, as I recall.

4037½ By Mr. MacIntyre:

Q. Well, if you have no knowledge as to whether the State of Illinois requested f. o. b. mills bids, I am asking you now whether you can testify that you have knowledge that others did not?

A. No, I would not be certain about that.

Q. You are just as uncertain as to this as you are as to the State of Illinois; is that correct?

A. Without putting something definitely in front of me so I can identify it, I would not answer the question.

4037½ Q. What did you have before you, Mr. Dawson, when you made the statements in your testimony

that you have given here concerning the policy of your company?

A. Are you through?

Q. Yes.

A. With reference to what?

Q. The policy of bidding f. o. b. mill or refusing to do so?

40377. A. I guess I stated before that we had no set policy on that.

Q. Do you want to modify any testimony that you have given heretofore concerning that, so as to agree with the statement that you have just made?

A. I think I have been consistent that we had no set policy on the f. o. b. mill bids.

Q. Do you mean by that that you have no invariable policy? Is that correct?

A. Well, you can call it variable, if you want to. I would say—

Q. I said "invariable."

A. I say that we have no set policy.

Q. What do you mean by that?

40378 A. Simply that in some cases we have bid, and in other cases we have not, depending on what the conditions are.

Q. Now, referring to Commission's Exhibit 1339, the so-called Good Friday invitation, you told Mr. Withrow on direct examination that one of your reasons for not submitting a bid in response to that invitation was because it was in the nature of an option. Do you recall?

A. That is right.

Q. Now, I show you Respondents' Exhibit 3180, and ask you to state whether or not you gave in that contract the State of Wisconsin the option to buy 425,000 barrels, without their obligating themselves to take a single barrel?

40379 A. I don't know where you get the idea that they are not going to take the cement here. It strictly provides that they are to take it.

By Mr. MacIntyre:

Q. They have an option that they can take up to 425,000 barrels; is that correct?

A. (Reading): "The Commission purchases and agrees to receive and pay for, and the cement company agrees to sell"—if that is not—

Q. Take any cement up to 425,000 barrels that they desired; is that correct?

A. Approximately 425,000 barrels of Portland cement. I don't see anything in the form of an option on that one.

Q. Well, I call your attention to this phraseology (reading): "This contract includes only a part of the estimated 1932 cement requirements, but the Cement Company is expected to complete shipments on any construction project started in 1932, but not entirely completed by December 31, 1932—provided that cement deliveries under this contract for unfinished project allocated to Cement Company shall not extend beyond June 1, 1933."

Now, was the quantity set that you were to furnish under that?

A. Certainly it was.

Q. If the State had gotten into difficulties and 10380 had not done any of that construction work prior to June, 1933, you would not have furnished them any cement, would you?

A. They had an obligation on their hands.

Trial Examiner Norwood: What was the essential difference between that and the one in the Good Friday invitation?

The Witness: This was a set sale of 425,000. The Good Friday bid had no provision for deliveries; quantities to be delivered at one place, when they would take it, or where they would take it.

Trial Examiner Norwood: In other words, the State here agrees to take that much cement?

The Witness: Yes; they do.

Trial Examiner Norwood: And in the other the Government did not agree to take any?

The Witness: It was optional on them. They just wanted a price on two or three million barrels.

By Mr. MacIntyre:

Q. I call your attention to item 11, on page 3, which is of the exhibit. That says (reading): "The Commission reserves the right to increase the quantity of cement purchased by twenty-five (25) percent."

Does that make the quantity definite?

A. Well, the minimum amount here 425,000.

Q. What about your maximum quantity?

A. That is their privilege to exercise, of 25 percent extra.

Q. It is an option on their part to take extra.

A. Twenty-five percent extra.

40382 Washington, D. C.,
Thursday, June 6, 1940.

40383 P. G. DAWSON thereupon resumed the stand and testified further as follows:

Cross-Examination (Resumed) by Mr. MacIntyre.

Trial Examiner Norwood: On the record.

40384 As to Respondents' Exhibits 3068 to 3088, for identification, I have studied the record, the testimony and the statements, and it appears to me that those contract invoices introduce a very great confusion into the situation, and also an element of uncertainty, as shown there by the testimony, that some of the invoices did not represent the going price. Now, I do not know just definitely and have not been able to find out definitely just what they are offered to prove. I will sustain the objection to their receipt in their present form, and will ask Respondents to segregate the invoices that represent the going price as of their date, or that establish any other points that they will expect to meet,—they are intended to establish, and where I find that that is relevant I will consider receiving them. They might be retained by Respondent until he has his tabulation, and they may be presented at that time when the matter is made clear as to just why they should be received in evidence.

As to Respondents' Exhibit 3183-A to Z-16, referring to those which have not been received, I have read over these, consisting of letters from dealers' associations, and letters and interpretations of the Code provisions. I thought that this subject had been completely covered. Is this material that has not been covered before by similar exhibits, Mr. Withrow?

40385 Mr. Withrow: Well, I do not know what you mean by "similar exhibits." The Commission put in a part of these stories, and these documents, in most instances, are documents referred to in exhibits already in evidence, and most of them are correspondence or letters between dealer code authorities and the cement code authorities, all under the N.R.A. Now, our position still is that the N.R.A. should not be in this case, but it is in. It has been let in the case.

Trial Examiner Norwood: Well, Counsel stated his point.

Mr. Withrow: But they do connect up. All we want is a ruling one way or the other.

Trial Examiner Norwood: Well, I want to know the grounds of their relevancy in order to enable me to rule intelligently on the matter. I want to know what they are intended to meet, what points they are intended to establish, and whether or not the Counsel has already presented identical evidence or similar evidence.

Mr. Withrow: Well, I will start at the end. We have not presented identical evidence. The question of similar evidence all depends on what you mean by "similar." There have been other letters from other dealer code authorities, but—

Trial Examiner Norwood: I mean evidence that
40386 covered these points.

Mr. Withrow: Not covering these transactions.

It is very difficult, of course, for me to argue that these things are relevant and material, because it is Respondents' position that nothing under the N.R.A. Code is relevant and material to the issue because there is no allegation, and because of the provisions of the N.I.R.A. itself, but under that catch all phrase in paragraph 7 of the complaint, the Commission has introduced evidence which they say tends to prove that the Code Authority was the alter ego of the Cement Institute and was used for the purpose of maintaining delivered prices or arriving at a customer classification, and everything else that is alleged.

Now, these letters between the dealer code authorities and the N.R.A. Code Authority for the Cement Industry completes the picture which they attempted to prove. It shows that the dealer code authority was the one attempting to put pressure on the Code Authority for the Cement Industry with reference to these matters that we are supposed to have created the Cement Code Authority to accomplish, and it is only for that purpose that those documents are offered; and it is difficult for us to argue their relevancy and materiality because we do not think they should be in issue. However, we do not dare, in this
40387 type of proceeding, let that point go by default. We have to attempt to meet it, and the only way we can attempt to meet it is to put all the facts on the record.

because we are convinced that with all the facts on the record that the innocence of the Code Authority for the Cement Industry, and all of these Respondents, will be very manifest.

Mr. MacIntyre: If Your Honor please, it is our contention, as we stated yesterday, that the documents contain arguments and conclusions just as far from this as the word "pressure" used in Mr. Withrow's last statement, and we have no opportunity to examine Mr. MacQueen, who made some such statements in those letters, if they are received over our objection at this time.

Mr. Withrow: With reference to Mr. MacQueen, I would like to recall to Your Honor,—I suppose the Commission will take judicial notice of the fact that the Federal Trade Commission has proceeded against Mr. MacQueen and entered an order against him because of the pressure he exerted on the cement companies, so I do not think I was overstepping myself.

Trial Examiner Nordwood: I do not see anything objectionable in using the word "pressure" here. I am trying to find out whether or not this material is of any value to these Respondents. That is the sole question here.

40388 The Code picture was put in, the Code was put in. I am trying to find out if it is relevant in any particular to show these interpretations of the Code, and I do not see any relevancy in the proposition, just in and of itself, that the dealers brought pressure on the manufacturers except as received heretofore, to explain their action, and there is abundant testimony and evidence in the record to establish that.

Mr. Withrow: Well, the Commission's Counsel have attempted to prove, and apparently it was relevant and material because the evidence was received, the fact that there were meetings of Code Authorities concerning these questions raised by the dealers' Code Authority. Now, the Commission's theory at that time was, at least so they stated, where they did state what their theory was, that those letters showed an agreement by cement companies to arrive at some definition of a dealer or some dealer classification, or something of that type. Now, those documents there show or tend to complete the picture that the N.R.A. Code Authority for the Cement Industry, after Article XI was knocked out of the Code by the National Recovery Administration, were requested by the Admin-

istrator to negotiate with the Dealer Code Authority to see if a new Article XI containing a definition of a dealer and a classification of customers could not be arrived at.

In other words, if you take the evidence which the
40389 Commission has put in, put it in its proper background as those documents do, it shows that they were only doing what they were requested to do and required to do by the United States Government, and if that is not relevant and material here, why, I do not know what is.

Mr. MacIntyre: Now, the last part of that statement is exactly why it will be necessary for us, in order to get the true facts in this record, to have the writers of those letters, or at least one or two of them, present for cross-examination. You will note, if Your Honor please, that it all revolves about a statement of a conference in Washington. We want the right to ask the writer of those telegrams and letters referring to the Washington conference, to ask who attended that conference, and what the spirit of that conference is that that term is used in those letters. He says the spirit of the Washington conference. Where was it held? In the smoking room of the Willard Hotel? How many cement manufacturers attended? Who were they? What did they agree upon? That is what we want to know, yet they leave it out. We demand it. It is self-serving hearsay.

40390 Mr. Withrow: I do not see how it can be self-serving and hearsay when they are letters by people who were not employed by these Respondents.

Mr. MacIntyre: They were in conspiracy with them.

Trial Examiner Norwood: I hope that this will settle this question about attitude of dealers, and what was done under the Code.

I am going to receive these, subject to the usual conditions that they are not to be received as proof of the factual statements and conclusions contained therein. That is, included in those numbers, Respondents' Exhibit 3157, that is another proffer—that consists of these contract forms of this Respondent and it appears that they are dated—they show some date on which they were used, and they are admitted; of course, they do not show that they were used on any other date than the dates which appear on these. Counsel can enlarge on that if he wants to, but I shall overrule the objection and receive Respondents' Ex-

hibit 3157 series, C to R, and Respondents' Exhibit 3183 series, A-M, P-Z16, those which have not been heretofore received, subject to the conditions named.

(RESP. EXS. 3157-C—3157-R, and 3183 A-M, P-Z16 were offered and received in evidence.)

40392 By Mr. MacIntyre:

Q. Mr. Dawson, referring to Respondents' Exhibit 3183-P and Q, which is one which His Honor has just admitted into evidence, will you please tell me all that you know about who attended that conference that is referred to therein?

A. No, I cannot give you any information on who attended this conference because I was not there.

Q. Can't you tell me how many representatives of the cement manufacturers, who are Respondents in this case, attended it?

A. I do not know.

Q. Do you know where the conference was held?

A. No.

Q. Do you know who presided?

A. No.

Q. Do you know what the subjects were that were discussed?

A. No, I do not.

Q. And is your answer the same with respect to the conferences that are referred to in Exhibit 3183-G (handing the exhibit to the witness)?

A. No; I am not familiar with anything that was done in this respect.

Q. Will you tell us what you know about a conference which was participated in by representatives of cement manufacturers, Respondents here, and the representatives of various units of the National Retail Lumber Dealers' Association in Chicago, on March 19, 1935?

40393

A. I have no knowledge of any meeting of that kind.

Q. You do not know who attended it?

A. I do not.

Q. You do not know what took place there?

A. I do not.

Q. Or who presided?

A. No, sir; I do not.

Q. Commission's Exhibit, in this record, 832, shows

that B. H. Rader, one of the trustees of The Cement Institute, and vice president of the Lehigh Portland Cement Company, informed a number of trustees of The Cement Institute that Harloe Chaffee, of Buffalo, N. Y., had been designated as liaison representative between the dealers and cement manufacturers to work out problems of distribution. Do you know anything about that?

40394 A. I do not.

Q. You do not know how many times he saw Mr. J. B. John, of the Medusa Company?

40395 A. I don't know that he ever saw Mr. J. B. John.

Trial Examiner Norwood: He can test his knowledge as to all these circumstances.

By Mr. MacIntyre:

Q. Do you not know of the discussions that had taken place between Mr. B. H. Rader, of the Lehigh Company, and Mr. J. B. John, of the Medusa Company, concerning the subject of the appointment of Mr. Chaffee to the post that I have mentioned?

A. I have no knowledge of any discussions on that subject, or if they were ever held.

Mr. MacIntyre: We renew our objections to this group of documents that have just been received in evidence, and move, on the basis of the cross-examination, that they now be stricken.

Trial Examiner Norwood: Motion denied.

By Mr. MacIntyre:

Q. Now, at the close of the hearing yesterday, I asked you if the option which Respondents' Exhibit 3180 gave to the State of Wisconsin to increase its purchase under that contract by 25 percent, made uncertain the maximum quantity that you would have to furnish under that contract if the State desired to exercise that option. Do you recall?

Mr. Withrow: Your Honor, I object. The docu-

40396 ment speaks for itself, and is the best evidence.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think that those contracts may be compared by the Commission, or you may compare them and argue before the Commission that this testimony is inconsistent, but I do think his affirming or denying those matters would make any difference in the world. I will sustain the objection.

40398 By Mr. MacIntyre:

Q. I now show you, Mr. Dawson, Respondents' Exhibit 3166-A to C, and ask you to state whether or not that is a representative bid of your company, and represents the policy of your company (handing the exhibit to the witness)?

Mr. Withrow: Your Honor, I object. This has been gone into three times.

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: I want to call Your Honor's attention specifically to the record, page 40359, and following, where the question is:

"Q. Well, is that a typical bid of your company,
40399 Mr. Dawson?"

And it goes on for pages about that, about that whole line of inquiry, going back to that question time and time again.

Trial Examiner Norwood: Counsel has raised the point here, and I hope he will be permitted to clarify it.

The objection is overruled.

Mr. Withrow: May I have the same objection as I had to this entire line yesterday? In other words, he is now going beyond and raising the entire matter.

Trial Examiner Norwood: You may have the same objection.

Mr. Withrow: Thank you, Your Honor.

A. This particular bid I would not say is typical of our policy. As I stated yesterday, we have no set policy on bidding f. o. b. mill price.

By Mr. MacIntyre:

Q. Well, is it representative of your company's reaction to such invitations?

Mr. Withrow: The same objection.

Trial Examiner Norwood: Overruled.

A. If I am not mistaken, we have bid quite a few times here in the last few years on an f. o. b. mill basis.

By Mr. MacIntyre:

Q. You have done so more willingly since July 2,
40400 1937, than you did previously, though, have you not?

A. No; I would not say that.

Q. I show you Commission's Exhibit 1895-A and B, and ask you if that is the signature of Mr. J. B. John, the presi-

dent of your company, at the end of that letter (handing the exhibit to the witness)?

A. Yes; that is Mr. John's signature.

Q. And now, in this letter of Mr. John's, which you just identified, he stated, in reply to a letter from Governor Horner, asking why he did not bid f. o. b. mill in an invitation that had just been sent to him:

"I can say that we would not be willing to bid f. o. b. factory because it would have the same effect as outlined in our answer to the first question as to why we did not bid f. o. b. mill."

And his answer to the first question was this:

"If we bid a mill price to that we would have added the freight to the various destinations."

Why, if you know, did your company take that stand at that time, in connection with its refusal to bid f. o. b. mill to the State of Illinois?

40401 Trial Examiner Norwood: Let him see the entire exhibit.

(Mr. MacIntyre handed the exhibit to the witness.)

Trial Examiner Norwood: Do you think you can answer the question now?

The Witness: Well, Your Honor, the letter itself answers the question.

Trial Examiner Norwood: Well, can you answer the question?

The Witness: I refer to the letter as the answer.

Trial Examiner Norwood: That was not the question. Can you answer this question?

40402 The Witness: Well, carrying that out here, he figured in bidding f. o. b. mill he was afraid he would not be competitive in price.

Q. And when you say that he was afraid, and you adopt that as your answer also—afraid he would not be competitive in price—do you mean to say he was afraid he would not make his price the same as his competitors?

A. No; he had no means of knowing what the lowest price would be.

Q. But if any of the others quoted the same price, he would want to quote the price they did; is not that correct?

A. No; not necessarily.

Q. What would he want to quote in a case like that?

A. The lowest possible price that we could find in that market.

Q. And you would not want to quote any lower than that?

A. If we could find a price lower there, we would meet it.

Q. Yes; but not lower than any price you could find? Is that what you mean by being competitive?

A. No; by meeting the lowest price that is in existence.

Q. When you say "by meeting the lowest price that is in existence," you mean not making one lower than the lowest one.

A. Not if we could help it.

Q. And if the lowest one happened to be the same as all the others, of course you would mean, then, to
40403 make a price the same as your competitors; is that correct?

A. We do not know what our competitor is going to bid.

Q. You stated if you quoted f. o. b. mill that you would not know what they were going to bid, and you could not be competitive. Is that our understanding of your answer of a few minutes ago?

A. Not quite in that same form.

Q. Well, you form it again for us.

A. I will put it this way: Asking us to bid, as they did in this case, on a very large quantity of cement, we would not be in a position to find out what the low price would be in any particular point of destination where the cement is going to be used.

Q. You mean the quotations of your competitors?

A. Well, I would not say the quotations of our competitors, so much as any one of them.

Q. Any one quotation of your competitors?

A. Any low one.

Q. Of your competitors?

A. We find out what it is, if we possibly can, so as to meet that lowest price.

Q. And that was the reason you would not bid f. o. b. mill?

A. In that particular case it was, because it was a large quantity of cement involved.

Q. Was that the principal reason?

40404 A. I am not through.

Trial Examiner Norwood: Let him finish.

A. (Continuing) It was a large quantity of cement involved, and you are either in or out, one or the other. You had no chance to get a portion of the business. If you are low you get all of it. If you are high, you are out completely.

By Mr. MacIntyre:

Q. And that is the reason, as you have stated, in that case, for not bidding f. o. b. mill; the principal reason why you would not bid f. o. b. mill in the other instance?

A. No.

Q. Well, what are the other reasons?

A. I have been asked that question many times. It depends upon what the situation is and the conditions of the invitation to bid.

Q. On direct examination Mr. Withrow asked you about Commission's Exhibit 1063, which listed you as one of the people getting an invitation to bid on 1,620 barrels of cement f. o. b. mill in October, 1935. You stated the reason you did not want to bid in that instance was because the cement was to be used out of your territory. Is that the only reason you did not bid in that case?

A. I don't know what the exhibit is.

Q. Well, the cement in that instance was to be used in Rolling Fork, Miss.

40405 A. That is away outside of our territory. The fact of the matter is we did not know whether that was an f. o. b. mill price or delivered price. It was away out of our territory, and we were not interested in any way.

Q. It so happens that that called for an f. o. b. mill price, as well as a delivered price, Mr. Dawson. Can you tell us why you did not bid f. o. b. mill at your factory at Dixon, Ill., on that invitation?

Mr. Withrow: Your Honor, unless the statement of Mr. MacIntyre is testimony, there is no evidence in the record that the invitation called for bids on an f. o. b. bases, and we further object on the ground that the invitation itself is the best evidence as to what the terms are, and that document is not in evidence in this case. When the matter originally came up, we demanded and insisted that it be put in. Counsel for the Commission was then not willing, and until it is in evidence I do not think Counsel for the Commission should say what its contents are, in the form of a question or otherwise.

Mr. MacIntyre: Now, if your Honor please, that same statement Mr. Withrow has made on many, many other occasions, that the record does not show that this invitation called for an f. o. b. mill bid, and we represented to you heretofore that the record did so show. Of course, every

time he calls for the record we cannot furnish it to
40406 him, but we have it this time.

I call your attention to lines 21 to 24, page 4993 of the record, where, on cross-examination, it was developed by John Hershberger, Respondents' Counsel in this case, that that invitation was on both bases, f. o. b. mill and delivered.

Trial Examiner Norwood: What have you to say to that, Mr. Withrow.

Mr. Withrow: Mr. MacIntyre well knows that the invitation does not so provide. The invitation is not in the courtroom, and speculation by the witness on the stand as to what the invitation might contain, I do not think is evidence even if it appears in the record.

40408 Q. Well, Mr. Dawson, at line 15, page 40084, you stated that you did not bid on this invitation of the Government in October, 1935, for cement in use at Rolling Fork, Miss., because after observing that destination you were not interested at all.

Now, will you please tell me why, with that invitation calling for an f. o. b. mill price, as well as a destination price, that you did not bid on the f. o. b. mill provision?

A. Because it was just outside of our distributing area, it was far away.

Q. Well, the f. o. b. mill price would be outside of your distributing area?

A. It was so far away we were not interested in it at all.

Q. Even at f. o. b. your mill?

A. We had no interest.

Q. You are not interested in bidding f. o. b. your mill to the Government when it is asked for?

A. I said that in this particular case that we were not interested in bidding at Rolling Fork, or whatever it is, Mississippi.

Q. You were not interested in bidding simply because the cement was to be used there; is that correct?

40409 A. It was too far away for us. People down there are in a position to give service; we were not.

Q. You were not willing to try, in giving a bid to the Government, whether or not you could give the service such as would be acceptable to the Government?

A. We had no interest in it.

Q. Isn't it a fact the lack of your interest in that invitation was because it called for f. o. b. mill bids?

A. I would not say that. I think it is shown that we have bid f. o. b. mill.

Q. Well, there are instances in the record, I just pointed out to you Mr. John's letter, Commission's Exhibit 1895-A and B, where you refused to bid f. o. b. mill.

A. There are cases where we refused and there are cases where we have bid.

40410 Q. Now, referring again to Respondents' Exhibit 3180, you told us yesterday that that price bid in there was below your base price, and you gave us your base price as $1.13; do you recall?

A. I said I thought it was that. I was not certain, but it was back quite a few years, and I did not have any record here to refer to.

Q. You were aware that at that time there was a differential of a considerable amount between bulk delivery and delivery in package?

A. Yes. There always has been a differential between bulk and package.

Q. It was greater then than it is now?

A. That is true.

Q. And isn't it also a fact, Mr. Dawson, that just about the time that you gave that price to the State of

40411 Wisconsin, that price of 90 cents, that you placed bases at Manitowoc, Dixon, and Silica, because of price cutting from published prices in the territory served by those three mills?

A. No, not at that time. My recollection is that was a different period.

Q. Well, you had placed them in just previous to then, according to your testimony on direct, at July 1, or during July, 1930?

A. I know; this is 1932.

Q. I said previous to it.

A. Oh, you did not say how far previous, though.

What is the question there?

Trial Examiner Norwood: Read it.

(Question read.)

A. We placed bases in 1930, if I recall.

By Mr. MacIntyre:

Q. July?

A. July. This contract is dated April, 1932. Now, the price named in this contract ties in with a price in Milwaukee at that time. There was a delivered price at 90

cents in and around Milwaukee. We did not feel that we could ask the State to pay more than that Milwaukee price with the exception that Milwaukee was delivered, and what we bid here it was an f. o. b. mill bid price outside of Milwaukee delivery.

40412 Q. But some of the price cutting in the industry by your competitors from their published prices had continued subsequent to the date you placed in these bases about which you testified on direct and the date on which you gave the State of Wisconsin that 90-cent price?

A. Oh, I think I testified the other day that we put in the bases at Dixon and several of the other plants hoping that we could seek a level where there would not be any cutting, but our experience was that it did not do us any good at all, that they cut still further, and that is evidenced by the pricing mentioned in here, that it did go down still further.

Q. And since there was such uncertainty as to what your competitors would quote in their bids to the State of Wisconsin if regular destination published prices were adhered to in your bids, you felt that you had a greater opportunity to get some business by giving an f. o. b. mill price of 90 cents in this contract; is that correct?

40413 Mr. MacIntyre: The witness has testified on direct and again in cross, no less than 10 minutes ago, that the price cuts from published prices made it uncertain and more difficult for them to get business. That is the substance of his statement.

The Witness: No, I did not say that.

Mr. MacIntyre: Well, let him clear it up for us if it is not the substance of his statement.

Trial Examiner Norwood: Clear it up.

The Witness: I said that we put in the bases.

By Mr. MacIntyre:

40414 Q. Why?

Mr. Withrow: Let the witness finish his statement.

Trial Examiner Norwood: Let him finish.

The Witness: We tried to arrive at a price that would be low enough so that we thought it would stop cutting. On the other hand, it did not. Our experience was that after our bases were in, prices went down still lower to the point where it just made our base price inoperative.

By Mr. MacIntyre:

Q. Well, why did you want to put a price in, putting these bases in low enough to stop cutting of the published prices?

A. To try to protect our own company.

Q. Well, in what manner did you feel that that would protect your own company, Mr. Dawson?

A. We would get a price down there low enough so that there would not be any cutting, and at the same time be high enough so that we would not lose so much money on the sale.

Q. Well, why were you so anxious to get the price sufficiently low that there would not be any cutting?

A. For the simple reason that we did not know where we were half the time.

Q. You did not know what your competitors were going to be charging if they continued cutting, didn't you?

A. That is right.

40415 Q. That is what I thought you said in substance a few moments ago.

Now, I will come back to the original question I asked you: When you put in this 90-cent price, as is evidenced by the contract, Respondents' Exhibit 3180, you gave more certainty to your ability to get the business than had theretofore been the case when your prices had been higher; is that correct?

Mr. Withrow: Just a minute. I think that Mr. MacIntyre is laboring under a misapprehension, that the document he is talking about is a bid. The record shows and an examination of it shows that it is a contract, and that the contract was made on an f. o. b. mill basis. Now, I think we ought not to confuse these two things.

A. No, I do not think that is the case at all.

By Mr. MacIntyre:

Q. Well, you did state that you had put the price down to a point where you hoped that there would

40416 be no cutting; is that correct?

A. Now, wait a minute. If you will observe this contract you will find that the State of Wisconsin would have paid 90 cents a barrel regardless of where the price went; if it went down to 50 cents the State would have had to pay 90.

Q. But so long as your competitors were able to cut

below your published prices, it was more or less uncertain as to what business you would get on any bid that you made to any State official; is that correct?

A. No, I do not think it is correct, if I under-
40417 stand the question correctly.

By Mr. MacIntyre:

Q. Do you mean to say that so long as your competitors—that the prices were high enough that your competitors were continuing to undercut them in 1930 and 1931,—the early part of 1932,—that you were still certain as to the amount of business that you would be able to get when you bid any particular prices?

A. We tried to find the low price in the market or for the job.

Q. Well, when this price cutting was going on back in 1930 and 1931, were you able to do that in all instances?

A. Not in all instances, no.

Q. Well, didn't that give rise to your uncertainty as to your ability to get business on any particular job?

A. There was a certain amount of uncertainty, naturally.

Q. It was more uncertain then than after you put the price down to 90 cents to the State, in that particular instance, as is evidenced by Respondents' Exhibit 3180; is that correct?

A. No. This 90-cent price here is more or less current price in cement at that time.

Q. But I say, when it got down to that level, it was more certain that they would not undercut it; is that correct?

A. That was about the size of it, but you could not tell.

Q. But, I say, it was more certain?

40418 A. We did not know what our competitors were going to do. They might have had a price less than 90 cents for all I know.

Q. Now, Mr. Dawson, referring again to Mr. John's answer to the Governor of Illinois, as is evidenced by Commission's Exhibit 1895-A and B, you stated that you adopt that last answer as to why your company did not bid f. o. b. mill in 1933. I will ask you why that same answer should not have applied with equal force in connection with the price that you named to the State and which the State accepted in Wisconsin, as is shown by Respondents' Exhibit 3180?

Trial Examiner Norwood: Do you understand that question?

The Witness: I cannot, no. It refers to a previous answer, and I cannot tie it in.

Trial Examiner Norwood: Did you have the same reason for bidding, for your action in the case of the one bid as in the case of the other?

The Witness: No. There are two different conditions here.

Trial Examiner Norwood: What were the differences?

The Witness: In the case of the Wisconsin bid we were permitted to make a price that would not be reduced. It was a peg price at 90 cents.

By Mr. MacIntyre:

Q. But when that 90-cent price was made, Mr. Dawson, that is when you named it to the State in the first instance, and before it was accepted by the State, did you have any assurance from the State that if they received an 89-cent price from somebody else on that quantity of cement that they would still give it to you at 90 cents?

A. As I recall, the 90-cent price was arrived at after a conference with the Commissioners and the Governor's representative.

Q. And did your company receive any assurance on that occasion that if the State of Wisconsin was able to get a lower quotation from somebody else that they would turn it down and still give you the business?

A. That was the lowest price they had at that time. They were willing to accept it—

Trial Examiner Norwood: Did they give you any assurance?

The Witness: Yes.

Let me finish the answer, Your Honor?

Trial Examiner Norwood: Go ahead.

A. They had the lowest price that was available at the time, that 90 cents. They gave us the assurance that if we delivered the 425,000 barrels, that that price would stand.

By Mr. MacIntyre:

Q. That is, you could have the contract for that?

A. That is right.

Q. Now, the record shows that subsequent to your failure to bid f. o. b. mill on this 3,000,000

barrels for the State of Illinois in April, 1933, that Governor Horner, through one of his agents, Robert Kingery, sent your company a telegram offering—that is, tendering an order for a million barrels, or more, of cement at $1.10 f. o. b. your mill at Dixon, Ill. Why didn't you accept that offer?

Mr. Withrow: Your Honor, just a minute. I object. If that is in evidence I would like Counsel for the Commission to show us where it is. I do not believe Mr. MacIntyre is correct. He may be. There is evidence of some such telegram to some company, but my recollection is it is not the Medusa Company. I do not think we should waste time unless the telegram was sent to the Medusa Company.

Trial Examiner Norwood: I think that the Counsel should ask him if that is a fact, and then propound any other questions he wishes.

By Mr. MacIntyre:

Q. Well, don't you recall that to be a fact, Mr. Dawson, that your company did receive the telegram from Robert Kingery offering an order for more than a million barrels of cement at $1.10 f. o. b. your mill at Dixon, Ill.?

A. I do not recall that.

Q. You do not recall any telegram from Robert Kingery making such an offer?

40424 A. Not on a million barrels.

Q. Well, on any quantity?

A. I do not even recall $1.10, to tell you the honest truth.

Q. Or any price f. o. b. mill, for any quantity of cement?

A. Well, yes, there was—I would not say it was a telegram. They wanted to know if we would bid f. o. b. mill, and Mr. John's answer as contained in that letter.

Q. I show you Commission's Exhibit 1096, and ask you to state if it is your testimony that your company did not receive a telegram from Robert Kingery similar to that one that was sent to Universal-Atlas in that instance?

A. I cannot answer the question because I do not know that we ever got one.

Q. You do not know, do you?

A. No. That is a telegram similar to this.

Q. Well, did Mr. John discuss this answer that he wrote to Governor Horner, that is evidenced by Com-

mission's Exhibit 1895-A and B with you before he sent that to Governor Horner?

A. We had a discussion in the office but I do not think I was in on the conference when they made their decision on this particular invitation.

Q. Were you in on any conference affecting any decision as to whether they would sell f. o. b. mill to Illinois immediately succeeding that letter?

A. I was in on some conferences, but I do not
40425 recall being in on the one that prompted this letter.

Mr. MacIntyre: Now, I want to call Your Honor's attention to the testimony of the Witness Hamlin as to what communications passed between the Medusa Company and the State of Illinois on this subject.

Trial Examiner Norwood: He simply referred me to certain testimony.

Mr. Withrow: Well, I would like to refer Your Honor to all of the Commission's exhibits, and point out that there is no such testimony as Mr. MacIntyre has been talking about for the last 15 minutes and trying to establish—

40426 The Witness: Let me see that exhibit.

Mr. MacIntyre: I am showing the witness Commission's Exhibit 1895-A and B, at his request.

By Mr. MacIntyre:

Q. Now, referring again, Mr. Dawson, to the price that you named to the State of Wisconsin, as is evidenced by Respondents' Exhibit 3180, I will ask you whether or not you gave that price to your dealers in Wisconsin?

A. In Milwaukee, the delivered price was 90 cents. That was the dealer price.

Q. Ninety cents on a bulk basis?

A. Yes; on a bulk basis. That is true. Of course, they took packages, in either paper or cloth; the price was adjusted accordingly.

Q. That was delivered at their warehouse?

A. Yes; that was delivered. At Manitowoc our price was, as I recall it, $1.13.

Q. To the dealers, delivered at their warehouse on a bulk basis?

A. That was not on a bulk basis; no.

40427 Q. That was on a package basis, exclusive of the package?

A. Exclusive of the package; yes.

Q. But including the cash discount?

A. Yes.

Q. What about any locations other than those two points that you have named? Was your price on that basis to the dealers in those other locations?

A. It was as far as it went out. If there were lower prices at any particular destination, we had to meet them.

Q. But beyond which that base price reached, you received higher prices from your dealers, did you not?

A. Higher than the $1.13?

Q. Yes.

A. No. How could you?

Q. Well, I will ask you if the basing-point prices in the upper part of the State, near Duluth, did not permit you to receive higher mill nets from dealers in Wisconsin than you did receive on its business from the State?

A. No, I cannot say how it would work out, Mr. MacIntyre. The $1.13 was the maximum amount that we could realize. Now, I don't recall any other mill price that would give us a higher net than that.

Q. Now, this 90-cent price is subject to no discount, is it?

A. That is right.

Q. For cash or anything else?

40428 A. This is cash here, as I recall. It speaks for itself, but I will look at it.

Q. I just want to get what interpretation you can give us on that.

A. No; there is no discount on this.

Q. So that if you put that on a comparable basis with your dealer price, it would be one dollar, less 10 cents cash discount; is that correct?

A. Yes; the dealer took the discount.

Q. And if you added 10 cents on the package basis, instead of bulk basis, it would make $1.10; is that correct?

A. Yes.

Q. What was your base price there at that time?

A. $1.13, is my recollection.

Q. So that it was only 3 cents off from your base price on a comparable basis?

A. If they took it in package.

Q. Now, on direct examination you stated that you had never been a member of the board of trustees of The Cement Institute:

A. That is correct.

Q. Mr. John, the president of your company, has, for quite a number of years, has he not?

A. No.

Q. Is it your testimony that Mr. J. B. John has not served as president of The Cement Institute?

40429 A. That is my testimony.

Mr. Withrow: I object to this. It is in the record. The minutes show when they became officers, or if they did not—

Trial Examiner Norwood: Objection is overruled. Counsel will please be seated. I consider the objection frivolous.

Mr. Withrow: I consider the question frivolous.

Trial Examiner Norwood: Please don't interrupt. My ruling is that Counsel cease his objection; and I have ruled.

Mr. Withrow: I would like to note a specific exception. I was going to make a suggestion and an objection, which would save considerable time. The documents, themselves, are the best evidence, and the oral testimony of this witness could not supplement anything.

Trial Examiner Norwood: The record also shows that Counsel completely disregarded my ruling. Now, let us not repeat that.

Read the question.

(Question read.)

A. Well, yes, he has served, but I think Mr. MacIntyre had something else in there, besides that, in that question.

Mr. Withrow: May I have the last two questions and answers read?

40430 Trial Examiner Norwood: I think not.

Proceed.

The Witness: I may have misunderstood that question because I think—

Trial Examiner Norwood: Do you want that read?

The Witness: Yes; I would like to have that read.

Trial Examiner Norwood: All right. Read the questions and answers.

The Witness: To see if I misunderstood the question.

(Record read as follows:

"Q. Now, on direct examination you stated that you had never been a member of the board of trustees of The Cement Institute.

"A. That is correct.

"Q. Mr. John, the president of your company, has, for quite a number of years, has he not?

"A. No.

"Q. Is it your testimony that Mr. J. B. John has not served as president of The Cement Institute?

"A. That is my testimony.") :

A. No; that is wrong. Mr. John did serve as a trustee. He has not been a trustee for some time.

By Mr. MacIntyre:

"Q. He served as an officer or trustee of The Cement Institute at about the time it was organized, did he not?

40431 A. I think you are correct on that.

Q. He also served on numerous committees?

A. Well, I am not certain.

Q. At least on some committees?

A. I am not certain. I know he was on the Code committee.

Q. He was on the advisory committee just about at the beginning of The Cement Institute, was he not?

A. Well, I couldn't say "yes" or "no" to that, because I don't recall whether he was or not.

Q. You testified that your dues to the P. C. A. were reduced at the time you gave notice of your resignation, June 13, 1932, and therefore the resignation that you gave notice of did not become effective. Can you tell us what those dues were on a per barrel basis before and after that change?

40432 A. I can't recall what the per barrel basis was, but I do recall that the reduction in dues exceeded 50 percent; in fact, I think it was pretty close to 60 percent.

By Mr. MacIntyre:

Q. Is it your testimony that any reduction was made in the per-barrel rate?

A. Naturally, it was reflected in the per-barrel rate.

Q. Is it your testimony that there was a change made in the per-barrel rate?

A. The dues are more or less based on a per-barrel figure.

Q. I am asking you, though, is it your testimony that there was a change made in the per-barrel rate?

A. I don't remember whether the revised dues are on a per-barrel rate or not. The original dues were; that is, as of 1932, before our resignation. It was on a per-barrel basis, but I can't remember the figures. I can't state whether the reduced dues were on a per-barrel basis, but I assume they were.

40433 Q. You have no definite knowledge on that?

A. No. That is back quite a ways, and I can't remember. The rates changed from time to time, in fact.

Q. Without knowing whether or not one was on a per-barrel rate and another on a flat rate, how could you compare the two as to the benefit your company might receive from the Association for each dollar expended?

A. If you take the dollars and cents one year in dues against the amount you pay the next year, and take your number of barrels and divide it out, you get the answer.

Q. If you had remained on a per-barrel basis, though, and you did less business in 1932 than you did in 1933, without any change in the rate or in the dues to the Association, you would have paid less; is that correct?

Mr. Withrow: Just a minute. This certainly is going away beyond anything that is relevant or material to these issues, and if Counsel for the Commission had not objected to the Respondents' Exhibit 3063, they would not even be trying to maintain what figures were, comparing 1932 and 1933, and would know that the Medusa Company shipped approximately the same, so that if there had been any reduction in dues it would have been a reduction in the per-barrel basis, and even if it was not a reduction in the per-barrel basis, it was a saving to the company. That is all that is material.

40434 Trial Examiner Norwood: Read the question.

(Quetsion read.)

Trial Examiner Norwood: Now, read Counsel's statement.

(Mr. Withrow's statement was read.)

Trial Examiner Norwood: Don't you think that statement is calculated to assist the witness in answering the question?

Mr. Withrow: No, it is not. It seems to me—

Trial Examiner Norwood: Well, answer the question.

Mr. Withrow: Well, I would like to have Your Honor demand of Counsel for the Commission whether it is relevant or material to any of the issues in the case.

Trial Examiner Norwood: We have had it up numerous times here.

Mr. Withrow: This is not The Cement Institute, Your Honor. This is the Portland Cement Association, not even a party to this case. It has nothing to do with the allegations in the complaint; it is not mentioned; it is not referred to, and it is away off on the question of the comparative per-barrel rates of one year as against another; it seems to me it is going very far afield.

Trial Examiner Norwood: What do you say to that?

Mr. MacIntyre: We are only attempting to clear up what Mr. Withrow brought out on direct examination.

40435 Trial Examiner Norwood: With respect to what?

Mr. MacIntyre: These dues, the changes in the amount of the dues that were paid by the company in June and July, 1932.

Mr. Withrow: Counsel for the Commission brought out some evidence that this company had resigned. I showed that they had written a letter of resignation, and I got the witness to testify that they made the resignation inoperative, and I asked him why they had done that, and he said because there had been a reduction in dues, and I asked him if after there had been a reduction if resulted in a saving to the Medusa Company, and the answer was yes, and there it is. Why go further?

Trial Examiner Norwood: Do you think he ought not to be permitted to cross-examine him now?

Mr. Withrow: No; but he is going away beyond that. Why should he be permitted to string it out? To ask him about the per-barrel rates has nothing to do with it.

Trial Examiner Norwood: Objection overruled.

Answer the question.

The Witness: May I have the question?

(Question read.)

A. Well, if the shipments had been the same in both years, and there was a decrease in the per-barrel rate for the year 1933, naturally there would have been a
40436 a saving. The effect of this whole thing was that there was a very substantial saving.

By Mr. MacIntyre:

Q. Yes; but the saving could have resulted from a reduction in the amount of shipments which your company

made in the succeeding year, if the per barrel rate had not changed?

A. You are assuming that, but that is not the case.

Q. Is it your testimony now, Mr. Dawson, that you made greater shipments in 1933 than you did in 1932?

A. No; I cannot testify to that, without having the records before me, but I know—

Q. Is it your testimony—

Mr. Withrow: Let the witness answer the question.

Trial Examiner Norwood: Let him finish.

By Mr. MacIntyre:

Q. Go ahead.

A. (Continuing.) I know that there was not any great substantial difference.

Q. Is it your testimony that you made as large shipments in 1933 as you did in 1932?

A. It is my recollection that our shipments were a bit smaller in 1933.

Q. So your dues to the Association would have been less if there had been no change in the per barrel rate; is that correct?

40437 A. Very little less, because I don't think there was enough difference in the shipments.

Q. I show you Commission's Exhibit 971-13-R, and ask you to state if you recognize the signature on that letter as that of Mr. Pfeifer of your company.

A. Yes; that is Mr. Pfeifer's signature.

Q. Tell us, if you know, to whom he referred in that first paragraph in that letter, in referring to the sales manager of your company?

A. That refers to Mr. McCormack.

Q. Mr. Andrew McCormack?

A. A. T. McCormack.

Q. Do you testify now, Mr. Dawson, that Mr. Pfeifer had no understanding with Mr. McCormack to write this letter and send the information that was sent to Professors Clark and Burns?

40444 Mr. MacIntyre: If Your Honor please, he has testified as to Mr. Pfeiffer's connection with the sales department. I am asking him now whether or not he, to his knowledge, had any understanding with Mr. McCormack to send that letter; that is, as to whether this witness knows of any understanding between Mr. Pfeifer

and Mr. McCormack that Mr. Pfeifer was to send the letter?

Trial Examiner Norwood: Well, ask him the question directly.

I will sustain the objection to that question.

By Mr. MacIntyre:

Q. Mr. Dawson, do you know that there was any understanding between Mr. McCormack and Mr. Pfeifer that Mr. Pfeifer was to write that letter?

40445 A. I know of no understanding between the two.

Q. That he was not to write the letter?

A. I don't know.

Q. You don't know anything about the truth of the matters stated in the first paragraph of the letter?

A. I remember Mr. McCormack was ill.

Q. But beyond that you know nothing at all about the truth or untruth of the statements in the first paragraph of that letter?

A. Well, he was ill. I know that was a fact.

Q. But beyond that do you know anything else about the first paragraph of the letter?

A. Well, that is all that is refers to, whether he was ill or not, that there was a delay in answering because Mr. McCormack was ill.

Q. Do you know anything about the truth or untruth of the statements contained in the second paragraphs of the letter?

A. I don't think it is a fact.

Q. Why don't you think it is a fact?

A. That it is true. I don't think it is true facts as stated here.

Q. Why don't you?

A. For the reason that I never considered the point as brought up in this second paragraph—I never considered it in the way that Mr. Pfeifer has expressed it here.

40446 Q. Well, why do you not consider it true?

A. For the reason that it is not a correct fact.

Q. Well, do you know whether or not Mr. McCormack told him to write the statement that is contained in there?

A. I don't know whether he did or not.

Q. Well, you don't want any testimony that you have given here concerning Mr. Pfeifer's connection or lack of connection with the sales department to reflect one way or-

the effect as to whether or not Mr. McCormack told Mr. Pfeifer to write that statement?

The Witness: I said that Mr. Pfeifer was an
40447 auditor, was not connected with the sales department at that time.

Q. Do you intend to imply by any testimony that you have given here, Mr. Dawson, that Mr. McCormack did not tell Mr. Pfeifer to write to Professor Burns what is stated in the second paragraph of that letter?

Mr. Withrow: The same objection.

Trial Examiner Norwood: The objection is overruled.

A. I do not know.

By Mr. MacIntyre:

Q. I am asking you whether or not you intend to imply through your testimony that Mr. McCormack did not tell Mr. Pfeifer to write Professor Burns what is written in the second paragraph of that letter?

40448 Mr. Withrow: Your Honor, I object.

Trial Examiner Norwood: The objection is overruled. Let him straighten this out.

A. I doubt very much whether Mr. McCormack told Mr. Pfeifer to write this letter. That is my opinion of it.

By Mr. MacIntyre:

Q. Will you please answer my question?

Trial Examiner Norwood: I think that answers it.

The Witness: I answered it.

Trial Examiner Norwood: That answers it.

The Witness: Maybe I did not say what you wanted me to say.

By Mr. MacIntyre:

Q. I asked you whether or not you intend for your testimony here to imply that he did not tell him that?

A. I doubt very much whether he did tell him; that is the honest truth; that is my opinion.

Q. But you have no knowledge as to whether you did tell him?

A. No.

Q. But you do not intend your testimony here to state that he did not tell him; do you?

Mr. Withrow: Your Honor, I object. We have been over that eight times.

Trial Examiner Norwood: Let him answer.

Mr. MacIntyre: I want a direct answer to that
40449 question.

Trial Examiner Norwood: Read the question.

(Question read.)

A. My opinion is that Mr. McCormack—

Trial Examiner Norwood: Wait a minute. He did not ask you for your opinion. He asked you what you intended to imply by your testimony here. I wish you would give him a direct answer.

The Witness: All right. I will answer that Mr. Pfeifer.

Trial Examiner Norwood: Wait a minute.

Read that question.

(Question re-read.)

Trial Examiner Norwood: Now, please answer that directly. Did you or did you not intend your testimony to have that implication?

Mr. Withrow: That is not the question, Your Honor.

Mr. MacIntyre: Well, I adopt that as my question.

Trial Examiner Norwood: Let him answer. I am instructing the witness now.

Mr. Withrow: Well, the same objection.

The Witness: All set to answer it.

Trial Examiner Norwood: Answer it.

A. Yes.

By Mr. MacIntyre:

40450 Q. Well, how can you state that,—do you know that Mr. McCormack did not tell him that?

A. I do not know.

Q. And yet you intend your testimony to imply that he did not tell him that?

A. Yes.

Q. Referring you to Respondents' Exhibits 3184 and 3185, can you tell me whether or not that at the time you made that price of 80 cents to the Castalia Portland Cement Company you were making prices at a similar level to other customers on a comparable basis?

A. This price was a little lower than the prices to the other customers.

Q. How much lower?

A. I do not recall just how much, but it was about enough to compensate Castalia for their sales efforts.

Q. Well, that is 80 cents a barrel there, and what was the next lowest price that you were receiving at that time?

A. Oh, I don't remember what that was. That is almost nine years ago; eight years ago.

Q. Well, were you receiving as much as—I mean, as little as a dollar a barrel from any of your other customers at that time?

40451 A. I do not think it was very far from it, net at the mill.

Q. I am asking you if it was below a dollar.

A. I do not recollect.

Q. Do you recall what the highest price was that you got from any other customer at your mill at that time?

A. No, I do not.

Q. You received your full base, didn't you—that is Bay Bridge?

A. Wait a minute. Now, let's see. This is 1932. I do not recall what the base price was at Bay Bridge at this particular date.

Q. $1.10, wasn't it?

Mr. Withrow: What is the date in the letter?

The Witness: June 24, 1932.

I do not recollect whether it was $1.10; somewhere in that neighborhood.

By Mr. MacIntyre:

Q. You sold cement to the Castalia Company during 1936?

A. That is right.

Q. And at that 80 cents price, still?

A. Oh, no.

Q. What price?

A. As I recall, it was $1.20 or $1.25 or $1.30; between $1.20 and $1.30.

Q. And at that time what was the highest prices

40452 you were getting from other customers at the mill?

A. I think our net was about 10 or 15 cents above that.

Q. Is your testimony that during 1936 you did not realize a mill net in excess of $1.50 at Bay Bridge?

A. Oh, yes—

40454 A. What I meant to say is the mill nets of $1.50 or $1.40, or whatever I said there, was an average mill net we received.

By Mr. MacIntyre:

Q. I asked you about the highest you received during 1936.

A. I do not know what the highest was at Bay Bridge.
Q. It was more than $1.75, though, wasn't it?
A. I doubt it.
Q. You do not have a basing-point price at Bay Bridge, or do you, or did not have in 1936?
A. No, we did not.
Q. You got on some sales a base at other points plus rail freight to a point such as Freemont, Ohio.
A. That is true.
Q. So that on that basing-point price, the lowest being Cleveland at $1.65, after January 8, 1936, you would
40455 have obtained that $1.65 plus freight to Fremont on shipments from Bay Bridge, wouldn't you?
A. Less our freight.
Q. Yes, less your freight, which, of course, would bring you up around $1.75, or more?
A. Well, I would not say that without having the figures. If I had the freights, and everything, I might be able to determine that.
Q. Well, is it your testimony that you had no knowledge that you secured as much as $1.60 to $1.75 per barrel on sales to customers other than the Castalia Portland Cement Company during 1936, in shipments from your Bay Bridge plant?
A. I cannot answer that definitely without having the figures before me.
Q. I am asking you about your knowledge now.
A. Well, it is only a guessing contest.
Q. I am not asking for guesses. I am asking for a statement of your knowledge, Mr. Dawson.
A. I cannot answer the question.
Q. You do not know?
A. No, I cannot tell you what the exact mill net was.
Q. What is your mill net to Bay Bridge on shipments into Cleveland, Ohio, today?
A. Today?

Mr. Withrow: Your Honor, I object.

40456 Q. Well, during 1936.

Trial Examiner Norwood: I think Counsel's point is well taken.

The Witness: Pardon me?

Trial Examiner Norwood: Answer the question.

Mr. Withrow: Go ahead and answer it for 1936.

A. For 1936.

Without having the figures before me, Mr. MacIntyre, I cannot tell you that. I do not even know what the Cleveland price was in 1936.

By Mr. MacIntyre:

Q. You testified on direct that you did, and gave Mr. Withrow a list of the statements here as is shown by Respondents' Exhibit 3158-A; you told him what the prices were throughout that period.

A. I had something to refer to at the time.

40460 Q. Mr. Dawson, referring you to your testimony on page 40234, I will ask you if that refreshes your memory and recollection as to prices quoted by your company in Cleveland during 1936?

A. Yes, it does.

Q. All right. On the basis of your refreshed memory and recollection as to what you were selling cement for in Cleveland during 1936, I will ask you the question: If you can tell me approximately what your mill nets were at Bay Bridge on your shipments from that point into Cleveland?

Mr. Withrow: Do you want a piece of paper?

The Witness: No, I can use this (figuring with paper and pencil).

By Mr. MacIntyre:

Q. At that time. That is, to customers other than the Castalia Portland Cement Company.

40461 (The witness figures with a paper and pencil.)

A. $1.30, if I have the correct rate here. I think I have; $1.30 at Cleveland.

Q. When delivered by truck or rail?

A. Rail.

Q. What?

A. Rail.

40462 Q. Referring to the last answer you gave before lunch as to your mill net at Bay Bridge on shipments made into Cleveland by rail 1936, what was your mill net on such shipments as were made by truck?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. $1.21.

By Mr. MacIntyre:

Q. What is the maximum mill net that you received during that year on shipments from Bay Bridge to Fremont, Ohio?

A. Without the rates, I cannot answer that question.

Q. What about Sandusky?

Mr. Withrow: The same objection to this entire line.

Mr. MacIntyre: Yes; I understand the Examiner gave him an objection and exception to the entire line.

A. I cannot tell you right now what we did net at Sandusky. Unless I have the rates, I cannot go back and determine that.

By Mr. MacIntyre:

40463. Q. Sandusky is just outside your mill location at Bay Bridge, is it not?

A. About six miles.

Q. And sales to customers in Sandusky are made on the basis of quotations—that is, the quotations made to them are on the basis of the Cleveland base, plus the rail freight from Cleveland to Sandusky; are they not?

A. No; they are made on the basis of the Cleveland base, plus freight to Sandusky, less our rate from Bay Bridge to Sandusky. All the way through there, in referring to the rate as between Sandusky and Cleveland is wrong. It is between Bay Bridge and Cleveland.

40464 Q. Well, is it not a fact, Mr. Dawson, that your delivered price as quoted by your company to your customers in Sandusky in the year 1936 was the equivalent of the Cleveland base price plus the rail freight to Sandusky?

A. The price at Sandusky, I think, was based on that formula.

Q. And your mill net at Bay Bridge on shipments into Sandusky, during that period, would have been the amount of such quotations, less the transportation charge from your plant to Sandusky, all rail?

A. That would be the net amount that we would realize on the sale.

Q. Can you give us what the rail transportation charges are from your plant, or were at that time from your plant, into Sandusky?

A. I cannot.

Q. Can you tell us approximately what they were?

A. I couldn't tell you, really.

Q. It is a switching charge, is it not?

A. No; I think it is a rate, but I am not certain.

Q. It would be the minimum rate, would it not, since it is only six miles?

40466 A. I cannot answer the question. I am not familiar with the rates.

By Mr. MacIntyre:

Q. On direct examination, Mr. Dawson, you testified that your company had generally deviated from its announced policy, as is shown by Respondents' Exhibit 3158-E. Just how general were those deviations from the terms of that announced policy?

A. The only one that I recognize here at the present time is a sale to commercial concrete mixing plants. Under this plan we were privileged to sell direct. We did not, in all cases.

By Mr. MacIntyre:

40467 Q. That is the only respect in which you now recall that you deviated from that announced policy previous to the issuance of the complaint in this case?

A. Well, there is the sale of cement to concrete and cement products. There are cases that I recall where we sold or continued to sell the cement through dealers.

Q. As a general practice?

A. What is that?

Q. As a general practice?

A. A few exceptions.

Q. Any other deviation from that policy?

A. I don't recall any right now.

Q. You did not, then, as a general practice, deviate from the policy, except in the respects that you have specified?

A. I recall definitely concrete products and ready-mix plants.

Q. But no others?

A. At the present time I don't recognize any others.

Q. Such deviations as you did make, and which you testified about, were more favorable to dealers than would have been the case if you had adhered to the policy?

A. Oh, yes; it was an advantage to the dealers; no question about it, because he had an opportunity to make a little money on the sale. On the other hand, he had to finance the party that was getting the material.

40468 Mr. MacIntyre: Will you read that answer, please?

(Answer read.)

The Witness: Can I add to that to clarify it? He had to handle the account.

By Mr. MacIntyre:

Q. But that was only in cases where he bought and sold the cement?

A. That is true.

Q. When you sold it direct, he did not have anything to do with it; did he?

A. The dealer had nothing to do with it.

Q. Now, when you testified on direct that you had no agreement with any of your competitors concerning the matter discussed in Respondents' Exhibit 3155-A to H, that is, the discontinuance of trucking service in the upper Peninsula of Michigan during November, 1935, did you mean to restrict your answer to agreement by you or by your company, or did you intend to have it sufficiently enlarged to include all people in your company?

The Witness: Will you repeat all of that for me?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, the decision to discontinue was arrived at by the officers of our company. We passed the word down to the various parties interested in it—those in our
40469 company, like Mr. Schwab, for instance, in charge of the Manitowoc office.

Q. When you stated, though, that on that subject you had no agreement with your competitors, did you mean to say that no official of your company had collaborated with any officials of your competitors on that subject before you announced that policy?

A. To my knowledge, that is correct.

Q. Well, when you say "to my knowledge," you are not taking into account the meetings that the record shows that the officials of your company had with representatives of your competitors, are you?

40470 Q. Well, when you made your statement that you had no agreement with any of your competitors on this subject, Mr. Dawson, did you take into account any collaboration that officials of your company had with representatives of your competitors?

Mr. Withrow: Same objection. The question has not been changed at all. It still assumes a fact not proved in the record.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: The objection is sustained.

Did you mean to testify that these officials did not have such a meeting?

The Witness: I have testified that to my knowledge we did not have any agreement of any kind with anybody as a competitor in regard to the discontinuance of trucking in Upper Michigan.

Trial Examiner Norwood: Did you give any testimony, or mean to give any testimony with regard to your officials meeting with any other officials on this subject at
40471 some other time?

The Witness: I have no knowledge of it; never heard of our officials having met with anybody, any competitor.

Trial Examiner Norwood: Do you mean to say that they did not?

The Witness: As far as I know they did not; that is correct.

Trial Examiner Norwood: As far as you know, did they?

The Witness: They did not. They did not meet.

Trial Examiner Norwood: Well, what do you know about it?

The Witness: Well, I know when we made the decision to discontinue trucking that there was no one of our competitors consulted about it. It was our own free will and deed that we did it.

By Mr. MacIntyre:

Q. Is it your testimony, Mr. Dawson, that Mr. J. B. John, the president of your company, never—that during that period of time between 1933 to 1935—communicated with competitors and discussed with competitors competitive conditions?

Mr. Withrow: Just a minute.

Q. Such as the one that is involved in the trucking in the Upper Peninsula?

Mr. Withrow: Can we have that question read?

40472 Trial Examiner Norwood: Read it.

(Question read.)

A. Why, no. I would not say that because I know he meets people that are in the cement industry. What they talk about at times I do not know. They may discuss trucking. But I do know that it was our own decision, our own decision among our own executives to discontinue trucking in Upper Michigan.

40473 Q. Did Mr. John, in conferences with you, express his position as to whether or not this trucking should be discontinued in the Upper Peninsula?

A. Well, naturally, we discussed it freely between ourselves.

Q. And are you prepared now to testify, and do you testify that before taking that position, as he announced it to you, that he was not influenced in taking the position by anything that he had said to any of his competitors, or that they had said to him?

A. There was nothing said to me by Mr. John which would lead me to believe that he was influenced by any competitor.

40474 Q. Well, when you say that no agreement was entered into by you with your competitors in connection with this matter, you did not intend, then, to include anything that might have been said between him and his competitors concerning this matter?

A. Well, if anything was said I was not there and I testified only to my own knowledge.

Q. So you did not intend anything outside of what had come between you and Mr. John to be taken as a basis for your statement that there had been no agreement between you and your competitors?

A. I want to make sure of that question.

Will you read it, please?

Trial Examiner Norwood: Read the question.

(Question read.)

The Witness: Wait a minute. You are referring to an agreement.

Will you read that question again? It contradicts itself.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Withrow: I wonder if the question could not be made more clear.

Trial Examiner Norwood: I do not think so.

Answer it.

A. Well, I will answer it in this way, that the 40475 statements I have made were based on the discussion Mr. John and I,—Mr. McCormack, I think, was in it,—had on the subject.

By Mr. MacIntyre:

Q. That is, between the three of you?

A. Yes. I think there was someone else in on it, too; Mr. Schwab was in on it.

Trial Examiner Norwood: Wait a minute.
Read that answer there.
(Answer read.)
Trial Examiner Norwood: Well, the witness can make an answer without a negative implication, and I want to ask him if he has any positive knowledge on the subject of whether or not Mr. John ever consulted about the subject with his competitors.
Q. Have you any positive direct knowledge on it?
The Witness: No, I have not. I have answered that at least three times.
Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. And do you know whether or not Mr. McCormack ever had any discussion with his competitors on this subject?
Mr. Withrow: Same objection.
Trial Examiner Norwood: Overruled.
A. I have no knowledge of him having any discussion with his competitors.

40478 Q. Mr. Dawson, I show you your testimony appearing between lines 18 and 23 at page 40229, and ask you to state how you were able to testify at that time that the matter referred to in Respondents' Exhibit 3160 was that appearing in Respondents' Exhibit 3152-A to Z? How did you know that?

40479 A. This refers to several exhibits here, and I don't know what they are right now.
Trial Examiner Norwood: Show him the exhibits.
Mr. MacIntyre: Mr. Withrow has them.
Mr. Withrow: I am handing the witness Respondents' Exhibit 3152-A to Z and Respondents' Exhibit 3160, and I will state that I have no objection to Counsel for the Commission using Exhibit 3160, providing they waive the question of the identification of the document. The relevancy and materiality of the document I believe already appear.
A. The price is stated right in here.
Mr. MacIntyre: Will you please read the question back to the witness?
Trial Examiner Norwood: Read it.
A. I thought you asked me if I could refresh my memory, or what I used to refresh my memory.

By Mr. MacIntyre:

Q. I asked you how you knew that the matter referred to in one referred to the matter in the other; as you testified there.

A. The first paragraph of this letter gives me the 40480 price and change.

Q. Well, how do you know that that is the matter that is referred to in the other exhibit, Respondents' Exhibit, for identification, No. 3160?

A. Without having that exhibit I can't tie the two together.

Q. It was necessary for you to have it when you were testifying on direct examination, in order to tie them together?

A. I think we were using it at that time to identify price changes and the possible dates of changes.

Q. As the basis for the testimony that you were giving there?

A. This gives me the price in 1936, 1937—

Q. Well, did you follow the last question I asked you, Mr. Dawson?

A. What was that?

Mr. MacIntyre: Will you please read it, Mr. Reporter. (Question read.)

Mr. Withrow: Which was the basis, Exhibit 3160 or 3152?

Mr. MacIntyre: He is talking about 3160.

The Witness: No; I am talking about 3152.

Mr. Withrow: Your Honor, if I may be permitted, with the consent of Counsel for the Commission, I think I can clarify this whole thing by one question. If you do not want it clarified, I will wait until the redirect.

40481 Mr. MacIntyre: I think I can clarify it, if I am permitted to go on without interruption.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Mr. Dawson, when you gave your testimony at lines 18 to 21 on that page, how could you do so—that is, in testifying that the matter referred to on one of the exhibits was the matter that was mentioned in the other?

Mr. Withrow: Your Honor, we are willing to concede that when Mr. Dawson made the answer which appears on lines 18 to 21 at page 40229 he had in his hand a memo-

randum marked as Respondents' Exhibit 3160, because he testified, after examining the second paragraph, that he found the second paragraph was the change referred to in Respondents' Exhibit 3152-A to Z, for identification. It is perfectly apparent, and we concede that he had it.

Trial Examiner Norwood: Let us have the answer of the witness.

Mr. Withrow: But we make the concession.

Trial Examiner Norwood: I think on cross-examination it is more satisfactory to let the witness answer.

Mr. Withrow: But, Your Honor, we are wasting time on a document that is not in evidence. It was not even offered in evidence.

Trial Examiner Norwood: I understand that but
40482 this is cross-examination.

Mr. Withrow: I object to the examination on the ground that it is an examination on a document that is not in evidence, and not offered or rejected.

Trial Examiner Norwood: Well, the grounds are not substantial.

Mr. MacIntyre: Then, I move to strike the witness' testimony appearing between the lines 18 and 23 at page 40229.

Trial Examiner Norwood: I shall deny that motion and I shall overrule Counsel's objection, and I shall ask the witness to answer this question.

You may proceed to clarify it.

The Witness: I am having trouble clarifying it, Your Honor, for the reason that I do not recall having this exhibit. Evidently I did. I was looking at so many exhibits, that day that I couldn't really identify it right now, unless I saw it; but I have before me here this price change, and it gives me the figure.

By Mr. MacIntyre:

Q. Yes; but when you testified at that point you said that the matter referred to in one of these exhibits was the matter that was set forth in the other. How did you know that?

Mr. Withrow: May I have my objection to this entire line?

40483 Trial Examiner Norwood: Yes.

Mr. Withrow: And also on the ground that we have conceded the point, and it is a waste of time.

Trial Examiner Norwood: Objection overruled.

A. I must have seen it.

By Mr. MacIntyre:

Q. Well, I am asking you, even though you saw the exhibit, how did you know that the matter referred to in one was mentioned and set forth in the other?

A. Because they both tie in together.

Mr. MacIntyre: I ask that the two documents be handed to the witness. I want to ask him further on that testimony.

Mr. Withrow: It is not relevant or material, and without direction by the Examiner, I will refuse.

Mr. MacIntyre: Then, I ask that the testimony be stricken.

Mr. Withrow: I would even accede to the motion.

Mr. MacIntyre: Well, let us strike it out.

Mr. Withrow: I would even accede to the motion.

Trial Examiner Norwood: I think Counsel had better turn that over and let him cross-examine the witness on it.

Mr. Withrow: If I turn this over, I understand that Counsel for the Commission are waiving their objec-
40484 tion as to the relevancy, materiality, and competency of the document.

Mr. MacIntyre: No, not waiving it as to the competency, or as to any of the grounds.

Trial Examiner Norwood: Counsel wants that to cross-examine, and it appears that he has a right to it.

Mr. Withrow: The record shows clearly the witness did not refresh his recollection and give any oral testimony from the document.

Trial Examiner Norwood: But he testified that the matter referred to in one exhibit is the same as the matter referred to in the other. Now, the Government wants to find out how he knows that, and they have a right to find that out.

Mr. Withrow: Yes; but if it does not specify what the matters are, how is it relevant and material enough to spend 15 minutes or a half hour to put it on the record?

Trial Examiner Norwood: It is definite and certain. Proceed.

Mr. Withrow: Exception.

The Witness: What is the question?

By Mr. MacIntyre:

Q. How did you know, Mr. Dawson, that the matter referred to in one of those exhibits was the matter set forth in the other?

40485 A. For the reason that one exhibit states that the price changed, that we mailed quotations on a certain day in the Cleveland market, and named prices. The other exhibit, 3152-A, identifies the price, and states that quotations have been made on it.

Q. When was the first time that you saw Respondents' Exhibit, for identification, 3164?

Mr. Withrow: Your Honor, I object to the question as not relevant or material. The document is not in evidence. It was not offered in evidence.

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: Counsel for the Commission well knows that that document was proposed as an addenda to the stipulated testimony of Mr. Dawson. Why we should waste time with this sort of procedure, I do not know. I object to the procedure as a waste of time, and a deliberate one. We offered to concede and have stricken the matter that Mr. MacIntyre has wasted 20 minutes on, and yet we cannot have it stricken. We have been spinning it out on the record.

Trial Examiner Norwood: It is clear that he should be permitted to cross-examine this witness on these papers. I will give Counsel an objection and exception, and I hope he will let us proceed.

40486 Mr. MacIntyre: Will you please read the pending question?

Trial Examiner Norwood: Read the pending question. (Question read.)

A. The day it was offered here.

By Mr. MacIntyre:

Q. You had never seen it before?

A. No—well, I saw it that same day.

Q. Well, before it was marked for identification?

A. Yes.

Q. How long before?

A. That morning.

Q. Who had it?

A. Counsel.

Q. Mr. Withrow?
A. Yes.
Mr. Withrow: Your Honor, I object.

By Mr. MacIntyre:

Q. Had you checked it with the records of the Medusa Company before you did so on the stand?

Mr. Withrow: I think a motion to strike takes precedence over the questions of Counsel for the Respondent, especially when I started first. I move to strike the last two questions and answers. They are not relevant, or material, and there is no testimony of record based
40487 on Respondents' Exhibit 3164. I object to the entire procedure.

Trial Examiner Norwood: If Counsel had objected at the proper time—

Mr. Withrow: Well, I move to strike.

Trial Examiner Norwood: Motion denied.

Mr. Withrow: I move, furthermore, to expunge the last question. I do not see why the name of Counsel for the Respondents need be specified.

Trial Examiner Norwood: Motion denied. It cannot prejudice you in any way, though I think it is a useless question.

Mr. Withrow: Then, why should it be in the record?

Trial Examiner Norwood: Go ahead.

There is a pending question?

Mr. Withrow: I object to the pending question as irrelevant and immaterial.

Trial Examiner Norwood: Off the record.

(There was a discussion off the record.)

By Mr. MacIntyre:

Q. Mr. Dawson, before you compared these two documents on the stand the day before yesterday, had you checked any records of the Medusa Portland Cement Company for the purpose of ascertaining whether or not the statements contained in Respondents' Exhibit, for identification, 3160 are true or not true?

40488 Mr. Withrow: Your Honor, I object to the question as irrelevant and immaterial. It does not support any of the issues whatsoever.

Trial Examiner Norwood: I do not think he testified anything about the truth of that exhibit; did he?

Mr. Withrow: Absolutely not one statement.

Mr. MacIntyre: He said one referred to the other, and I do not see how he can—

Mr. Withrow: Just a minute.

Trial Examiner Norwood: I do not think it involved his testifying about the truth of the document.

The objection is sustained. You may cross-examine him on the basis of his statement that the one referred to the same subject as the other, if you have not exhausted that.

By Mr. MacIntyre:

Q. Well, how did you know that one of these documents referred to the other, Mr. Dawson?

Mr. Withrow: The same objection.

Trial Examiner Norwood: I think you asked him that once, but I do not know whether it has been answered.

Mr. MacIntyre: I never got an answer, but in an effort to save time, I will pass the subject. I think the record is clear as to what I have run into in an attempt to get the facts regarding those two items in the testi-

40489 mony.

Trial Examiner Norwood: Well, I shall ask the witness how he knows that the matters referred to in the one document are the matters treated in the other. Can you tell us how you know that?

The Witness: Because the items in these letters tie right in with the other.

Trial Examiner Norwood: With the matter on the face of it?

The Witness: That is right.

Mr. Withrow: I move to expunge Mr. MacIntyre's last statement from the record, Your Honor? May we have it read?

Trial Examiner Norwood: It is not our custom to have them expunged.

40490 By Mr. MacIntyre:

Q. Mr. Dawson, I show you a copy of Respondents' Exhibit, for identification, 3163-A, B, and C, and ask you to state whether or not you know that dealers which are quoted prices by your company located in those towns compete with dealers in any other one of those towns (handing the exhibit to the witness)?

A. To my knowledge they do not.

Q. Well, how much do you know about that?

A. I would say with the possible exception of this Westview that I was looking at the other day, that is just on the outskirts of Pittsburgh, and it is possible that they might compete in that case.

Q. Is it your testimony that the dealers located in Baltimore, Washington, and Annapolis do not solicit business on the same project at any time?

Mr. Withrow: Your Honor, I object. The testimony of the witness referred to shipments made to the towns where they had their warehouses located and subsequent shipments were from those warehouses. The question was very narrow.

Trial Examiner Norwood: It went to the competition between these dealers, and he may bring out any
40491 feature of it.

The objection is overruled.

Mr. MacIntyre: Please read the question to the witness. (Question read.)

A. To my knowledge, they do not. They may, but I don't know about it.

40492 Q. Well, you actually do not know whether or not dealers in any of these towns named in Respondents' Exhibit, for identification, 3163-A to C compete or solicit business on any particular job with each other, do you?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. Now, you mentioned the three, Indianapolis, Angola, and Fort Wayne. I think you said if we shipped to a dealer in Indianapolis for the account of a dealer in Fort Wayne we would get information on it pretty quick, and—

By Mr. MacIntyre:

Q. That is not responsive to my question.

A. Well, let me finish my answer, there. and
40493 it is based on that. We have never had any information come in that I know of indicating that a Fort Wayne dealer ever shipped into Indianapolis, and it is on that basis that I say as far as our company is concerned, as far as I know, it has never occurred.

Q. Are you now prepared to testify that a dealer in Indianapolis does not submit a bid, and has not submitted a bid on the same project as a dealer from Fort Wayne?

Mr. Withrow: Same objection, Your Honor.

Trial Examiner Norwood: Overruled.

Mr. Withrow: It is not stated in the record.

Trial Examiner Norwood: Overruled.

A. I would have no knowledge of a dealer in Fort Wayne submitting a bid on a project, say, in Indianapolis.

Trial Examiner Norwood: I do not believe that just answers his question. Wait a minute.

Read the question.

I think you can answer that "yes" or "no."

Read the question.

(Question read.)

A. No.

By Mr. MacIntyre:

Q. You are not prepared to testify on that point?

A. Not on that point.

Q. And are you any better prepared to testify in that respect with respect to the dealers in any of the

40494 other towns listed in this exhibit?

A. No.

Q. Mr. Dawson, what did you have to do with the preparation of the questionnaires that your company sent to Professors Clark and Burns?

A. I did not have anything to do with it.

Q. Who in your company prepared them?

A. Well, I understand Mr. Pfeifer was working on it.

Q. Well, I am asking you about your knowledge. What do you know about it?

A. To my knowledge Mr. Pfeifer worked on it.

Q. Anyone else?

A. Not that I know of.

Q. At whose direction did Mr. Pfeifer work on those matters?

Mr. Withrow: Your Honor, I object to going into this. There was no testimony on direct examination concerning the Burns and Clark questionnaire in any way, and I object to opening it up on cross.

Trial Examiner Norwood: Well, there was a question asked about Mr. Pfeifer's authority.

40495 A. I am not certain, but I am inclined to believe that Mr. Maguire passed that on to him.

40496 By Mr. MacIntyre:

Q. And who was Mr. Maguire at the time?

A. He was vice-president and treasurer.

Q. Of your company?

A. Yes.

Q. Did you examine these questionnaires before they were submitted?

Mr. Withrow: Your Honor, the same objection.

Trial Examiner Norwood: Overruled.

A. No, I did not.

By Mr. MacIntyre:

Q. Will you say that this Commission's Exhibit 971-13-R is a part of the correspondence that Mr. Pfeifer carried on with Professor Burns in connection with his duties of preparing those questionnaires?

40497 A. This is a letter to Mr. Burns, and it is signed by Mr. Pfeifer, so it must have been the correspondence.

40498 Q. How long has Mr. Pfeifer been with your company?

A. Oh, I would judge about 15 years.

Q. He has worked in the general offices there all that time?

A. He has.

Q. And under the direction of Mr. Maguire, I believe you said, at some times?

A. Mr. Maguire, as treasurer, sort of oversaw the accounting department; that is—

Q. And other times—

Mr. Withrow: Let the witness finish the answer.

Trial Examiner Norwood: Let him finish.

A. I also was familiar with the accounting department.

By Mr. MacIntyre:

Q. He worked some times under your direction?

A. Well, yes, sometimes he has done some work for me.

Q. And sometimes under the direction of Mr. John, the president of the company?

A. If he had so desired, or had some special work.

Q. Don't you know he did at times?

A. Well, naturally, as president of the company.

Q. You have testified, Mr. Dawson, in paragraph 3 of your stipulated testimony that you assist in making

40499 decisions from the standpoint of sales policy.

A. That is correct.

Q. Mr. McCormack generally makes the decisions, he and Mr. John, on sales policy, though, don't they?

A. No.

Q. Who does?

A. I do.

Q. Do they sit in on all you do, or do you sit in on all that they do?

A. No, I would not say that any three of us all sit together all the time, because I am out of town quite often, and things turn up, but I am generally familiar with them. The same thing is true of Mr. McCormack.

Q. So somethings, according to your testimony, happen with respect to decisions on sales policy, between, say, Mr. McCormack and Mr. John when you are not sitting in there?

A. If I am out of the city, that is possible, yes.

Q. Now, in paragraph 5 of your stipulated testimony there is a statement that in 1928 the name of the Sandusky Cement Company was changed to that of the Medusa Portland Cement Company. Did you also change charters at that time, or the name in the charter?

A. Are you referring to, now—what year?

Q. 1928.

A. 1928. That was just a change of name.

(4056) Q. As it appeared in the charter?

A. That is right.

Q. Now, in the last sentence of your paragraph 35 of your stipulated testimony, you stated that on May 27, 1931, Medusa met this competition. Will you tell us what competition and in what manner it was met, as you say there?

A. You are referring to paragraph 35?

Q. That is correct.

(The witness reads the part referred to.)

A. What was the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. That is referring to the competition we found in Milwaukee.

By Mr. MacIntyre:

Q. It is a matter of trucking cement from silos?

A. From silos.

Q. At delivered prices?

A. Pick up or delivered.

Q. But all being charged for on the basis of a destination price?

A. That is right.

Q. Now, in your oral testimony, as well as in your stipulated testimony, you state that a silo erected by your company in Chicago, in order to obtain the advantage of low rates of water transportation between Manitowoc and Chicago.

Mr. Withrow: What paragraph is that?

Mr. MacIntyre: That is 36.

By Mr. MacIntyre:

Q. You have since secured the advantage of those lower rates, haven't you?

A. It depends entirely on the operation of the boat, how low your rates are.

Q. Well, you testified orally here that your rates, water rates, were lower than rail rates.

A. Generally, they are.

Q. Well, in so far as they are lower, you have secured the advantages of them, haven't you?

A. In some cases it has been an advantage, and in other cases it has been a disadvantage.

Q. I say, in so far as the rates themselves are lower you have secured the advantage in your actual operations?

A. Yes, we have paid less transportation charge.

Q. Than you would have if it had been transported by rail?

A. That is right.

Q. And when dealers have picked up cement at your Chicago silo, for truck delivery, they have been charged the delivered price in Chicago, haven't they?

A. That is right.

40502 Q. Now, in your stipulated testimony, paragraph 39, you have stated that the savings in water rates—that is, lower-than-rail savings in water rates over rail, is the way that should be—from Manitowoc to Chicago, is more than offset in operating a silo in Chicago. Do you recall that testimony?

A. I do.

Q. If you delivered from Manitowoc to Chicago by rail and still enjoyed storage facilities, your total cost would be higher than it has been to you through your utilization of water transportation, wouldn't it?

40503 A. Yes, there would be advantage of lesser freight rate by water than by rail. On the other hand, you have your expenses in connection with the operation of the silos and the packing plant.

By Mr. MacIntyre:

Q. Which you would continue to have if you enjoyed those facilities, even though you made shipments by rail?

A. Well, you are tying two together, and I do not quite understand that question there.

Trial Examiner Norwood: Consider the silo a common factor there to both methods of transportation; then would boat transportation be less than the rail or more than the rail?

The Witness: Well, the transportation, itself, would be less by boat, Your Honor.

Q. Well, with your company enjoying the facilities of distribution to a silo in Chicago on its shipments from Manitowoc recovers a higher mill net at Manitowoc when shipments are made by water than by rail?

A. No, it does not, after you deduct the expense of a silo operation.

Q. But that silo is operated whether the cement is shipped by rail or water, your mill nets are higher when the shipments are—

40504 Trial Examiner Norwood: His answer to my question covered that just 100 percent. I do not see how it could be covered any different.

Mr. Withrow: That is our position, Your Honor.

Trial Examiner Norwood: The silo is the common fator, and he said that boat transportation is less than the rail transportation. Now, all you have to do is to get your pencil and figure that out.

By Mr. MacIntyre:

Q. Well, if that is true, Mr. Dawson, why did you say in the last sentence of your paragraph 35 of your stipulated testimony that the savings in rates lower than rail Manitowoc to Chicago, is more than offset by the cost in operating a silo in Chicago?

A. Well, the fact remains that you cannot operate the Chicago silo without expense.

By Mr. MacIntyre:

Q. But, of course, you could not do that; then, if it was made by rail or water?

A. If you are shipping in there strictly by rail, it would not—

40505 Q. Are you—

Mr. Withrow: Wait a minute. Wait a minute. Let the witness finish his answer.

Trial Examiner Norwood: Let him answer.

A. If shipping in there by rail we would not have the silo.

By Mr. MacIntyre:

Q. If you picked up shipments at the silo you would have to have it, wouldn't you?

Mr. Withrow: That is too speculative.

Trial Examiner Norwood: Well, let him answer. He is explaining it for us.

A. I do not think it would be any economy in taking rail shipments, as a general rule, rail shipments to the silo, dumping them into the silo, and putting out by truck.

By Mr. MacIntyre:

Q. Your company did that from Sandusky to Cleveland, thought, over a period of time, didn't it?

A. We have no silos in Cleveland.

Q. You did, though?

A. Did we?

Q. During 1931, 1932.

A. That is the first I know of it.

40506 Q. When you made this statement in your stipulated testimony, paragraph 39, the last sentence, you were not putting your distribution facilities on the same and comparable basis for rail and water delivery when you said the cost of one more than offset the cost of the other?

A. The advantage of the silo is getting business, truck business, in Chicago.

Q. Yes. Which you could not do if you shipped by rail unless you built a silo.

The Witness: There is a difference between rail delivery and silo.

By Mr. MacIntyre:

Q. You were not putting them on a comparable basis when you made that statement?

A. No, that is true.

40507 Q. Just before the recess, Mr. Dawson, I believe you stated that you did not know anything about

your company having established a silo or warehouse in Cleveland.

Mr. Withrow: Your Honor, I object. That was not the testimony.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Did you state that?

The Witness: No; the question I answered was whether we had a silo, and I said that we did not have a silo in Cleveland. Now, he said "warehouse." We did have a warehouse.

By Mr. MacIntyre:

Q. Well, the warehouse that you did have afforded you facility for truck deliveries on cement that was stored there, that had been shipped from Bay Bridge; is that correct?

A. That is correct.

Q. And that cement was shipped by rail from the warehouse at Bay Bridge?

A. That is correct.

Q. The facility thus afforded in Cleveland cost something, did it not?

40508 A. Naturally, it did.

Q. Did it give your company any benefits at all?

A. Well, we were able to meet a similar situation ceated by competitors, and continue to make deliveries in that market.

Q. Well, did it aid you in doing so?

A. To this extent, that we would not have had the business if we had not done it.

Q. So the facility was worth something to your company?

A. In that respect.

Q. Now, referring to your stipulated testimony in paragraph 49, will you tell us what you meant there by the statement appearing on item 4 of that paragraph (handing a document to the witness)?

A. Well, there are several things that could be incorporated in that—the expense of selling, the cost of delivering—

Q. Well, as to this first part of that, the cost of selling, what did you mean by that interpretation?

A. Do you mean what I meant by the cost of selling?

Q. Yes.

A. You have your salesmen, your salesmen's salaries, expenses—

Q. How does all of that affect your decision as to whether you will go after a particular piece of business in a particular territory?

A. Well, if we were in a territory quite distant from the plant, where our service would be very poor—

40509 Q. Now, I am talking about sales.

Mr. Withrow: Let him finish his answer.

A. If we were putting a man down in that territory, our selling expense would be very great because of the service that we could get; it would cost the man's salary and expense down there, and the amount of business that we would get, because of poor service, would not warrant that expense.

By Mr. MacIntyre:

Q. Well, now, would you understand from that statement that the cost of selling one customer or a group of customers in a particular territory varies from the cost of selling other customers in other territories?

A. Naturally it does, because it is a question of volume, the amount of business a man can produce in a territory.

Q. It varies according to the volume that a particular salesman can produce; is that correct?

A. On a per-barrel basis, yes.

Q. So that if a salesman is able to bring in 500,000 barrels in six months through his efforts, your costs in accepting that business, in so far as his efforts go, are less per barrel than is the cost on some salesman that is able to bring in only, say, 50,000 barrels?

40510 A. If their salaries and expenses are approximately the same, your statement is correct.

40511 Q. Do you have any salesmen whose salaries and expenses vary by as much as ten times?

Q. Any one whose salary and expenses are ten times those of the other.

A. Not to my knowledge, no, they are not.

Q. Was your per-barrel sales expense in the transaction referred to in Respondents' Exhibit 3180 equal to your average business that year?

40512 A. In the case of this contract with the State of Wisconsin, the price, the amount that we received for that cement was the most that we could have gotten, whether we had a salesman or no salesman. That made no difference in this particular case.

By Mr. MacIntyre:

Q. Can you tell me, Mr. Dawson, whether or not, during that period of time—that is, in the year 1932—you had any territory in which salesmen of your company operated and sold cement, where their sales expense per barrel was as low as you found it to be in the sale shown by Respondents' Exhibit 3180?

40513 A. Our selling expense in the Manitowoc sales area was less than in any of the other territories.

By Mr. MacIntyre:

Q. Well, was it not less in this transaction per barrel than on the general business of your company in the Manitowoc territory for that year?

A. There was no sales expense connected with this contract at all.

Trial Examiner Norwood: Then, it is less; is it?

The Witness: It must be, because I was the only one—Mr. John and myself were the only ones in on the signing of this contract and arranging for it.

By Mr. MacIntyre:

Q. Now, will you please turn to paragraph 57 of your stipulated testimony.

A. Paragraph 57?

Q. Yes.

A. Yes.

Q. Were you referring in the second line there to the entire amount that you recover at your mill?

40514 A. In the second line, you say?

Q. Yes.

A. Looking at our mill net.

Q. And that is all items that are included in the mill net?

A. The net amount that we receive.

Q. Now, will you turn over to paragraph 60. In the last sentence there you stated that in recent years Medusa followed the policy outlined there. Was not that about 1933? When you say "recent years," it covers the last seven, does it not?

A. I think I may be mistaken on this, but I think it dates back to the Code.

Q. Beginning with the N. R. A. Code period?

A. I would say "yes."

Q. And continuing right down to date?

A. I think so.

Q. Now, will you turn over to paragraph 62. What did you mean by the word "all," that you use in that paragraph of your stipulated testimony?

A. By that we mean in the event of a change in price coming to our attention; we check our major markets first.

Q. Well, did you mean to say there all markets?

A. All markets where we find this change. I would not say that if there was a change of price in Wisconsin that we would check the markets in New York and Pennsylvania.

Q. Do you mean to say you would check all the 40515 important markets in the State of Wisconsin?

A. Wherever we find new quotations out, we check our major markets, and then work down to the smaller markets; so I would say wherever we could find a change, we would check all the major markets within that area.

Q. How many would it be necessary for you to check before you would issue new quotations to all destinations?

A. How many markets would we check?

Q. Yes.

A. Well, if you are referring to Wisconsin naturally we take in Milwaukee, Madison, the points in the Fox River Valley, going up towards Green Bay—just feeling out, because the boys are in that territory all the time.

Q. If you check that number of points—I think you named five or six there—if you had checked the number of dealers in each of those points and you found that a base point price change had occurred, reflecting itself at Manitowoc, would that be sufficient for you to issue new quotations throughout the entire territory, to all towns?

A. No.

Q. Reflecting the change?

A. No. What you would do would be that we would endeavor to find out how far this change was reflected, whether reflected back to a certain basing point. After we were satisfied that it reflected back to a base, then 40516 we would send our quotations on the basis of the lowest price that we could find.

Q. What percentage of the total towns to which you would send such quotations would you check? Would it be one out of every ten, or would it be less than that?

A. I would say normally a salesman makes up in that territory five or six towns a day; sometimes more. In

addition to that, they are apt to work on the telephone, calling up some of their dealer friends, and finding out if they had anything in the way of new quotations from a competitor.

Q. How many salesmen do you have?

A. So I would say that we would perhaps check between fifty and seventy-five points before—

Q. Before satisfying yourselves?

Mr. Withrow: Let him finish his answer.

A. —before we could make sure that we had the pattern.

By Mr. MacIntyre:

Q. And once you had satisfied yourself and made sure that you had the pattern, then you would proceed to send out quotations reflecting that pattern to the several hundred destinations in Wisconsin?

A. That is right.

Q. And that is the policy of your company with respect to all of its territory, is it not?

A. Yes, that is right.

Q. Now, will you turn over to paragraph 64, and 10517 will you tell us what you know about the matter that you set forth there in the last sentence of that paragraph?

A. As far as the contractors are concerned, they will get a job, get an award, and they usually hold off buying until—I might say until almost the time that they need the cement, in the hope that they—I should not say "in the hope," but endeavoring to get the lowest possible price for the material he is going to buy.

Q. Do dealers do likewise?

A. Well, in some cases, yes, but, of course, the dealer—it is a little different with the dealer, because he has business coming and going all the time. The contractor buys in large volume.

Q. Do you say that dealers do not shop around?

A. Well, I don't say they do not shop around, but I don't think you will find them shopping around quite as much as a contractor.

Q. Can you cite any instance from your experience where dealers have shopped around to get a better price than that quoted by one manufacturer?

A. Quite often. I can't mention names right now, but

I have heard of instances where dealers have asked for lower prices than our quoted prices.

Q. It is not their practice to do so; is it?

A. I would not say it is not their practice, because
40518 I know I have had them ask me for it.

Q. Well, there is a difference in their practice from that of the contractor?

A. Well, the contractor, you see, buys anywhere from, say, 10,000,—speaking of road contractors,—from 10,000 to, maybe, 50,000 barrels for delivery within a comparatively short time. Sometimes they are attractive business for a company.

Q. Why is that more attractive than dealer business?

A. Well, if you had a large inventory of cement, there are weather conditions; it does not have to be moved, and you see the possibilities of unloading that cement in a hurry. Prices have been made on that basis.

Q. In what percentage of the volume of business that your company handles do you say you have deviated from your published prices?

40519 A. That would be almost impossible for me to answer.

Q. Well, is it one percent of your business?

A. I don't know whether it is one or two or three. I never tried to compute a figure of that kind.

Q. Well, would it be as much as five?

A. I just mentioned that I never computed a figure of that kind. I cannot answer.

Q. Well, from your experience, can you make any estimation?

A. Well, I do not see how in the deuce I could. In the first place, you have not set any period.

Q. Well, let us take in a little smaller territory.
40520 Consider that question in connection with dealer business only. In what percent of the volume of your trade to dealers have you deviated from your published prices?

Mr. Withrow: When?

Q. (Continuing.) Any time previous to July 2, 1937, and subsequent to July, 1932.

A. I don't see how I can even answer that, because I have no knowledge of the number of barrels that we shipped to points where we found the prices less than our published prices, and where we had to meet that price. Of course,

I assume that where we met that price, the deviation from our published price or quoted price, I should put it.

Q. Well, can you cite any instances within that period that I have mentioned where you have deviated from your published prices in your sales to dealers?

A. Yes, I have known of some cases where we deviated from our published prices to meet competition.

Q. In your sales to dealers?

A. In our sales to dealers.

Q. Will you please cite us an instance that occurred during that period?

A. You are talking of the period prior to July 2, 1937, and also subsequent—

Q. To July, 1932.

A. Oh, subsequent to July, 1932?

40521 Q. Yes.

A. I missed that. Let me see. I should be able to think of one, but I cannot, offhand, at the present time.

Q. They were rare, were they not, during that period?

A. There were a very few, but I don't remember who they were, offhand.

Q. Is it not a fact that they were very rare, if any existed, Mr. Dawson?

A. There were some that existed, but just to name them I can't right now. I just can't recall to mind.

Q. Well, were they not very rare?

A. Well, I can't say how rare they were, but I know there were some.

Q. What percentage of your total business, in your estimation, was involved in such deviations of published prices in sales to dealers?

A. I think I have already mentioned that I had no—I do not have in mind any figure that I can state.

Q. Well, would it be as much as 2 percent?

A. I don't know.

Q. Would you say that there occurred as many as ten instances, in your experience, during that period?

40522 A. Strictly guessing, I would say so, that there
40523 were at least ten, maybe more, maybe less. I don't have the information available at the present time, and I can't answer the question.

By Mr. MacIntyre:

Q. What did you mean in this stipulated testimony, in the last sentence on paragraph 107, in the phrase "from time to time," Mr. Dawson?

A. Well, we have found it from time to time.

Q. Well, how many times is what I am trying to find out from you now.

A. I say I couldn't tell you. If I had the information available, I would tell you.

Q. Well, was it from one time in 1932 to one other time in 1935, or just how many?

A. Oh, no.

Mr. Withrow: Your Honor, I object to this badgering of the witness.

Trial Examiner Norwood: Objection overruled.

A. Well, as a specific instance, this is something that comes to my mind. I don't know just what year it was, but I think it was prior to July 2, 1937. I think that was the closing-out date, wasn't it?

By Mr. MacInfyre:

Q. Yes.

A. If I am not mistaken, in the Cleveland mar-
40524 ket, about the year of 1933, or 1934, we had quotations out. Our quotation was out for—well, I don't know how long, the only quotation that we had out, but we found other prices in that market, which we met. Now, how long that period is, I can't remember, but in that one instance I dare say that there were a good many sales made.

Q. Can you recall any other instances in your experience where you deviated from your published prices in your sales to dealers during that period from 1932 to 1937?

A. Offhand, I can't right now, but I know there are other instances, but I can't tell you where they were.

Q. I am trying to find out what you meant by "from time to time." You have given us one time. Now, from what time to that, or from that time to another time, did this occur?

Trial Examiner Norwood: I think he has explained that.

By Mr. MacIntyre:

Q. You have stated that it was probable that there are some few less than ten or some few more than ten such instances. I will ask you now if you would be willing to testify that, except for the instance that you have referred to, there were as many as ten, in your experience, during those five years?

40525 A. I am not in a position to testify as to the number.

40526 Q. Now, referring to your last statement in paragraph 65, you have stated that Medusa will be eliminated from a market if it did not meet the price of its competitors. I am asking you to state whether or not in your experience that Medusa ever attempted to carry on business in any particular market in quoting prices higher than its competitors?

(Witness examines documents.)

A. Excluding the period mentioned in the stipulation here—that is, during the shortage of cement, I do not recall of Medusa of ever selling cement at a price higher than their competitors were quoting.

Q. How can you then conclude, as you did in the last sentence of that paragraph, that Medusa would be
40527 eliminated if it has never tried it out?

A. For the reason that a dealer will not, or no one else, will pay you a premium for cement. It is a standard product. We never quote, to my knowledge, send a price out that we thought was higher than our com-
40528 petitors. What we are always trying to do is to find what the low price is so we can be competitive and remain in the market.

Q. That is true even though you give a dealer the services that you have referred to in your stipulated testimony, of your customers, did not offer them all the same thing?

A. What do you mean by services? What services do you mean?

Mr. Withrow: What paragraph is it?

By Mr. MacIntyre:

Q. Well, you testified here orally and otherwise as to the services performed by your company in carrying on its business.

40532 Trial Examiner Norwood: I think I ruled that question out and asked the Counsel to ask another question.

Mr. McFadden: All right.

Trial Examiner Norwood: Based on that section 7.

Mr. McFadden: So long as it does not compare services of Medusa with some services of some competitor.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. Well, Mr. Hanson, in the light of your testimony as to the importance of the price element in your explanation of your stipulated testimony, paragraph 65, why is the item (6) in your stipulated testimony, paragraph 49, important at all?

40533 A. It is important in this way, after you meet the low price you have to be in a position to make deliveries to the purchaser when he wants them, and the way he wants them.

Q. But if you are unable to make the deliveries quite as quickly as your competitor and will give the price advantage of 2 cents per barrel, what happens then?

A. Well, it depends on the conditions entirely. Now, in some cases it might be an incentive for the purchaser to buy. In other cases it may not.

Q. You mean at the higher or lower price?

A. It might be an incentive to buy at the higher price, and it may not.

Trial Examiner Norwood: To buy at the higher price and receive the extra service?

The Witness: It depends on conditions entirely.

Trial Examiner Norwood: Or vice versa?

The Witness: Yes.

By Mr. MacIntyre:

Q. Well, it is not your testimony that your services in delivering, that you say you refer to in item 6, paragraph 49, of your stipulated testimony, is exactly the same as that of all your competitors, do you?

A. Oh, no.

40534 Q. In any particular territory—that is, in any given territory—would your answer still be the same?

A. Well, the only comparison I can make, the service is where we and our competitors have silos, and deliver by truck. In the case I think our services, perhaps, are about the same.

Q. Well, what about deliveries of delivery into Columbus, Ohio? Is this the same as your competitors there?

A. You pick out Columbus. We can give over-
40535 night service into Columbus, which I think is per-
haps about as good as any of our competitors.

By Mr. MacIntyre:

Q. Cincinnati, Ohio, can you do so?

A. I am not sure about Cincinnati.

Q. Are you prepared to say that your services are or are not the same in delivery into Cincinnati as those of your competitors?

Mr. Withrow: Same objection.

A. I say that—

Trial Examiner Norwood: Go ahead.

A. I say that some of our competitors can give better service than we do.

By Mr. MacIntyre:

Q. You do not make any difference in your price because of that, do you, to your customers in Cincinnati?

A. No.

Q. You quote them no lower than your competitors quote them?

A. We quote what we find is the lowest price.

40541 Q. Well, this price filing with the Trade Practice Committee of The Cement Institute, which you showed through an exhibit that Mr. Withrow put into evidence here that you discontinued on December 14, 1935, will you say that your sending of prices to The Cement Institute which your company knew was relayed to its competitors was not sending price information to your competitors?

A. In the case of price filing with The Cement Institute, I did not have that in mind when I was answering your question.

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40543 P. G. DAWSON thereupon resumed the stand a testified further as follows:

Cross-Examination (Continued) by Mr. MacIntyre:

Q. Mr. Dawson, showing you Respondents' Exhi 3183-Z-5, can you tell me what correspondence your co pany had with The Cement Institute preceding your ca cellation of that contract?

A. I do not think there was any correspondence wi The Cement Institute in connection with the cancellation this contract.

Q. Is it your testimony that your company r
40544 ceived no report from The Cement Institute an made no report to The Cement Institute concerni that cancellation of that contract?

A. To my knowledge, yes.

Q. Well, when you say "to my knowledge," what d you know about it? Is it your testimony that there wa no such report?

A. Yes.

Q. It is your testimony now that you received no repo from The Cement Institute and your company made n report to The Cement Institute concerning that contract

A. Yes.

40545 Q. I now ask you, Mr. Dawson, is it your te mony that The Cement Institute did not have i
40546 field men checking this contract referred to in Re spondents' Exhibit 3183-Z-5 before you canceled it

A. I do not know about that.

Mr. Withrow: May I have my objection to this entire line, Your Honor?

Trial Examiner Norwood: Yes.

Mr. Withrow: Thank you.

By Mr. MacIntyre:

Q. You have no knowledge on that?

A. No.

Q. But you say you do know your company received no report from The Cement Institute and made no report to

The Cement Institute either before or at the time of cancellation of the contract; is that correct?

A. It is my recollection that we were not reporting contracts at that time, the date of that letter, and I answered the question on that basis.

Q. But now are you stating that you have no recollection, or are you positive that no such reports were made in this instance?

A. Well, I am not positive, but I say to my knowledge I am almost certain that nothing was done in the way of reporting at that particular time.

Q. Well, upon what do you base your statement of that?

A. For the reason that we discontinued reporting contracts, speaking of Medusa. I think that was during the period of that time.

Q. Is it now your testimony that you had discontinued the reporting of contracts, specific job contracts, to The Cement Institute previous to July 24, 1930?

A. There was a short period, and I think it was around that time. I cannot say, but it is just I have it in my mind that at that time we were not reporting.

Q. Isn't it a fact, Mr. Dawson, that it was subsequent to July, 1930, that you suspended the reporting of contracts to The Cement Institute?

A. We only have a few days' difference there between that letter and the date you mention in the question. Now, it is possible you are correct. I cannot remember the exact date, but I just had in my mind that it was during the time this letter was written that we were not reporting.

Q. Is it your testimony now, Mr. Dawson, that you suspended your reporting of specific job contracts to The Cement Institute prior to August 1, 1930?

A. I do not remember the exact date. I cannot testify to that.

Q. Well, how can you testify that you are certain that you did not report this specific job contract referred to in Respondents' Exhibit 3183-Z-32?

A. Because I had it identified with just about that time, June of 1930.

Q. But now you cannot tell us whether you discontinued prior to July 1 or August 1?

A. My previous testimony was on the basis we had discontinued. Now, I have in mind June of 1930. That was the basis of my testimony.

Q. And is it your testimony that you did discontinue in June, or suspend the reporting in June?

A. You have mentioned several dates, and I am not so clear on it now whether it was June or July, or somewhere in there, but we did discontinue there for a short period.

Q. But you don't know when?

A. Not exactly.

Q. So any testimony you have given concerning this matter in Respondents' Exhibit 3183-Z-5 must be taken in the light of your lack of knowledge and recollection, now?

A. As to exact dates, yes.

Q. Can you tell me what you understood Mr. Aulenbacher to mean in that letter when he used the word "logical"?

A. No, I do not know what he meant.

40549 Q. Mr. Dawson, I now refer you to Respondents' Exhibit 3120-G, and ask you to state whether or not you can tell us that the price referred to therein is one on a delivered basis for carload delivery or truck delivery?

A. It does not state, so I cannot answer the question.

Q. You do not know?

40550 A. I do not know without having supporting data.

Q. Is there any supporting data which has been put in here that would permit you to tell us? Here are all the exhibits that have been put in by the Respondents since you have taken the stand. Do you have anything that would permit you to testify as to what that is?

(There was a short lull while the witness examined the exhibit.)

A. No. I do not find anything in here to tie in with this at all.

Q. You cannot tell us what it means, then?

A. Yes, I can tell you that it announces an increase of 15 cents per barrel in the Saginaw-Bay City district effective July 29th.

Q. You cannot tell us whether or not that that was an increase in the base price at that point for delivery by rail?

A. Not with the information before me here now.

Q. I now show you Respondents' Exhibit 3183-Z-8. Is that a letter by Mr. Vanderwerp, of your company?

A. It is.

Q. What is the significance of the 15-cent figured used in there?

A. Merely that on March 13, 1931, Medusa established a delivered-on-truck price 15 cents below Chicago f. o. b. car price from our Chicago silo.

40551 Q. Was the f.o.b. car price delivered to any destination in the switching limits of Chicago?

A. Yes—wait a minute. This is delivered-on-truck price.

Q. Delivered?

A. On truck.

Q. Delivered on truck where?

A. At the silo.

Q. But you charged the delivered price in Chicago by rail, less 15 cents; is that correct?

A. That is correct.

Q. How long did that continue?

A. I cannot answer the question without having supporting data. I do not remember it.

Q. Do you have any supporting data there that would permit you to answer that question?

A. There is nothing here.

40552 Q. Now, referring to Respondents' Exhibit 3156, how long did the price that is quoted to the Castalia Company in that letter continue?

A. During the year of—through the year 1936.

Q. Did it also continue through the year 1937?

A. It is my recollection we only shipped 115 barrels in 1937, and I think the same price was charged.

By Mr. MacIntyre:

Q. The same price?

A. I think so.

Q. All of those shipments were made from Bay Bridge, weren't they?

A. No. There might have been a shipment from Silica.

Q. They were made either from Silica or Bay Bridge?

A. There is a possible chance of them having been made from Wanpum, also. I will say the bulk of it is from Bay Bridge.

Q. Now, referring to Respondents' Exhibit 3065-A to F, do the mill nets referred to therein provide for any cash discount, deductions below them?

40553 A. This is net.

Q. After cash discount?

A. After cash discount.

Q. And what is your testimony as to whether or not the range of mill nets shown on that exhibit for each of the mills were substantially different in 1936 from those shown in 1937?

A. I think there was a price reduction in 1937. I was trying to identify the date. If that is a fact, this here would be a little lower than 1936.

Q. So taking that into account, your mill nets on deliveries to your customers in Sandusky are higher as shown in this exhibit for 19—were higher for 1936 than those shown in that exhibit for the year 1937; is that correct?

A. If the price was higher there would be a slight difference, yes.

Q. Now, I asked you yesterday afternoon several times if you could tell me approximately what your mill nets were on your shipments in 1936 and 1937 to your customers in Sandusky.

A. You were not talking about 1937 yesterday. You confined it to 1936.

Q. I will now expand the question to include both 1936 and 1937 and ask you if by referring to Respondents' Exhibit 3065-G you can answer the question.

A. I can answer it in this way, that within the five-mile zone our mill net was $1.39.

40554 Q. Did that include Sandusky?

A. No.

Q. How much further out is Sandusky?

A. It is within the five and ten-mile zone.

Q. What was your mill net?

A. $1.46.

Q. And if I understood you, you say that your mill net for 1936 for that zone on shipments from Bay Bridge would be higher than for 1937?

Mr. Withrow: Just a minute.

The Witness: I mentioned here a while ago I thought there was a price decrease in 1937, so the 1936 figure would be a little higher, if that price increase,—or the

40555 higher price was in fact $1.36.

Trial Examiner Norwood: Read the pending question, the previous question.

(Question read.)

Trial Examiner Norwood: Did you say that, or is that a fact?

The Witness: I did not say it in that same form.

Trial Examiner Norwood: But did you say that in substance?

The Witness: Yes, in substance.

Trial Examiner Norwood: The objection is overruled.

Mr. MacIntyre: I ask that Respondents' Counsel hand the witness Respondents' Exhibits 3160 and 3152 so that the witness may now further refresh his memory and recollection and give us testimony with certainty on that point.

Mr. Withrow: Respondents' Exhibit 3160 was not used to refresh the witness' recollection. Without there being a ruling from His Honor to the effect that the witness did use it to refresh his recollection, I will refuse the request.

Trial Examiner Norwood: I think Counsel is within his right.

Mr. MacIntyre: You mean in requesting it or in refusing it?

40556 Trial Examiner Norwood: In refusing it.

Mr. Withrow: I will make this statement, that if Counsel for the Commission will waive all objections to the receipt in evidence of 3160, I will be very glad to hand it to him.

Mr. MacIntyre: If Your Honor please, on the basis of that ruling, I want to renew the motion to strike the testimony of this witness which purports to give these price changes for 1936 and 1937 in the Cleveland base.

Mr. Withrow: There was no testimony about any changes in the Cleveland base. There was some testimony about what the delivered price was that Medusa quoted in Cleveland. There was no reference whatsoever to prices in Sandusky, Ohio. So that—I mean the two are not connected up at all. And, furthermore, the record clearly shows, and His Honor ruled yesterday, that the witness did not use Respondents' 3160 for the purpose of refreshing his recollection even as to the delivered price in Cleveland.

Trial Examiner Norwood: Well, I ruled so far as any record that had been cited to me it did not appear so, and it has not appeared so yet.

Mr. Withrow: Well, that is what I meant.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. Mr. Dawson, you recall your testimony con-
40557 cerning price changes in Cleveland during 1936 and during 1937?

A. Yes, I recall the—I have given the changes there for the two years.

Q. Well, using the same knowledge as you used then, that you gave Mr. Withrow in your testimony as to those changes, and relying upon that same knowledge, what can you say as to this price decline that you have said you believed took place in the early part of 1937?

A. It is my recollection it was about a 10-cent difference in the price in the Cleveland market.

Q. That is, downward?

A. What is that?

Q. Downward?

A. Yes.

Q. In the early part of 1937?

A. That is my recollection.

Q. Now, referring you to your stipulated testimony, paragraph 74, is your explanation to your use of the word "all" appearing in the fifth line of that paragraph, the same as your explanation to the use of the same word in paragraph 62 of your stipulated testimony?

A. Let me see—your next paragraph—74, did you say?

Q. Seventy-four.

A. There must be some mistake. I do not find any reference to it in 74.

40558 Q. You have used the word "all" in the fifth line, paragraph 74. I am asking you whether or not your explanation as to your use of that word in that line in that paragraph is the same as the one you have given for the use of the same word in paragraph 62 of your stipulated testimony.

Trial Examiner Norwood: Didn't you ask that same question yesterday?

Mr. MacIntyre: About still another paragraph. They repeated it in several paragraphs, Your Honor.

A. I can't tie the two of them in together.

By Mr. MacIntyre:

Q. I asked the question in that form to save time. I will have to ask you now, what did your mean by the use of the word "all" as you used it in the fifth line, paragraph 74, of your stipulated testimony?

A. In that case we found that in Michigan, the Lower Peninsula of Michigan, all the prices we found were on a flat basis.

Q. Well, how many did you find out of the several hundred destinations?

A. I can't answer.

Q. Would you say as many as fifty?

A. I presume we did. I can't answer the question.

Q. Would you say there were more than fifty?

A. I don't know.

40559 Mr. Withrow: I object to asking him.

Trial Examiner Norwood: Overruled.

By Mr. MacIntyre:

Q. Would you say there were more than fifty?

A. I don't know how many quotations we picked up in the field.

Q. How many did your word "all" refer to, there, in line 5 of paragraph 74?

A. Those quotations which we picked up.

Q. You cannot tell us how many destinations there were?

A. Why, no.

Q. Were there as many as half the destinations for all of the State of Michigan?

A. I might have seen one. I might have seen two. But the number they picked up I can't say because I don't know how many they picked up.

Q. Well, from your experience and your best recollection as to what occurred there, how many will you say that they picked it out of the several hundred destinations?

A. I don't know how many they picked up. I am not going to make a guess.

Q. Well, you do not want your testimony in that particular paragraph 74 to be taken that they picked them up even from as many as 25 percent of all the destinations in the State of Michigan before you made your price change, do you?

40560 A. I am not going to testify to the number they picked up.

40561 Q. I am asking you now how you want your testimony to be taken, Mr. Dawson. We have gotten away from how many they picked up. I am asking now how you want your testimony to be interpreted.

A. I want my testimony to be interpreted in this way: During the usual course of business in the daily activities of the salesmen they pick up quotations, new quotations,

in the field as they appear. That information is sent down to the sales department, district office and main office, and we learn. I have no way of saying there were any number of quotations coming in, with the exception that I know that they were picked up.

Offhand, I want this understood, that I do not go into all the picayune details that go on in that sales department from the standpoint of picking them up. We know what the policy is and what the boys are going to do. I will testify on that basis.

Q. Well, now, coming back to your explanation as to what your policy was and how it applied to the use of the word "all" in these other paragraphs that we referred to, particularly paragraph 62 of your stipulated testimony, would you say that you would attach the same significance to the word "all" in the fifth line of paragraph 74?

A. In the case of paragraph 62 I explained yesterday—

10562 Trial Examiner Norwood: Well, state whether or not you attach the same significance. Make him a direct answer to the question; then we can go into it further.

A. Yes, I say they have about the same significance.

Mr. Withrow: Can we now have the explanation that the witness started to give?

Trial Examiner Norwood: No. You can bring that out on redirect.

Mr. Withrow: All right.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Now, referring to the last sentence of your stipulated testimony in paragraph 74, can you tell me whether or not the instance referred to in that sentence occurred before or after your Company had made its decision to send out quotations on a flat price basis in the State of Michigan, Lower Peninsula?

A. You say in the last paragraph of 74?

Q. Last sentence of paragraph 74.

A. Last sentence, I should say.

We naturally send them out after we learn what had happened.

Q. I am asking you whether you sent them out before that instance occurred which is referred to in that sentence.

A. Oh, we send out our quotes after we learn what had taken place.

40563 Q. You mean after that one dealer called you and told you what is set forth in that one sentence?

A. Wait a minute. The last sentence is only about—

Q. It is the next-to-the-last. Pardon me.

Mr. Withrow: Well, I want the record to show that the witness has been addressing himself specifically to the last sentence. I was wondering about that.

By Mr. MacIntyre:

Q. I am sorry. The next-to-the-last sentence of that paragraph, Mr. Dawson.

A. Well, this only mentions one case of a dealer having informed us of a change that had taken place.

Q. Can you tell me whether or not that took place before or after you made your decision to send out quotations to points in Lower Michigan?

A. This took place before we sent out,—before we made our decision.

Q. What date did it occur?

A. I do not remember the exact date.

Q. How can you tell us now, then, that it occurred before?

A. Well, it is just natural that it would have occurred before. I can't give you any dates.

Q. Who was the dealer?

A. It is my recollection it was a dealer in Detroit.

Q. Which one?

40564 A. I think it was Standard Products Company.

Q. Can you tell me the person who made the call?

A. It went through our district office, as it states there.

Q. You cannot inform us as to the man so that if we want to check on it we would be able to talk to him about it?

A. No. I recall the situation, that is all.

Q. You cannot tell us the day on which it occurred?

A. No, I cannot.

Q. Or the name of the representative of the Huron Company that is reputed to have made the statement?

A. No, I do not know anything about who told the dealer. The dealer picked the information up from the salesman evidently, because he reported it that way to our sales office.

Mr. MacIntyre: If Your Honor please, I move to strike the next-to-the-last sentence in paragraph 74 of the stipu-

lated testimony. We are unable to rebut that by getting information from the person who is reported there to have made the telephone call.

Mr. Withrow: Well, in opposition to that motion to strike, the witness has named the dealer, the dealer company, which is certainly a more definite showing with reference to statements made than occurred in many instances on the Commission's case.

Trial Examiner Norwood: He named—

Mr. Withrow: He named the name of the com-
40565 pany. He said he did not know who in the company called. It seems to me that that is pretty definite.

Mr. MacIntyre: But there are several officers of each of these dealer companies. In a great many instances it would be a large dealer in the City of Detroit. If we go to those officers we cannot determine which one made the statement.

Trial Examiner Norwood: I will deny that motion.

Mr. MacIntyre: I want to further point out that it is hearsay, and we have not any way of checking up on it.

By Mr. MacIntyre:

Q. Now, in the last sentence of your stipulated testimony, paragraph 75, is it your testimony that you have not used basing points, basing-point prices, through the institution of the same at your mills for the purpose of changing the level of prices over given territories surrounding such mills?

A. The stipulation states that after we find a uniform figure that runs back to some basing, we use that figure.

Does that answer your question?

Q. And you also say there, "and for nothing more"; is that correct?

A. We will determine the lowest price we can find in the market, and we quote in there to meet the lowest price.

Q. And you say there "for nothing more."

Mr. Withrow: The stipulated testimony does not
40566 state that. I do not see why time and time again we have to misquote things, especially when Mr. MacIntyre has it in front of him.

Trial Examiner Norwood: Well, he is asking him whether he said that or not. He is not asking him for a fact.

A. No, I did not say that.

By Mr. MacIntyre:

Q. Well, I am asking you whether or not that in addition to what you have stated that basing points are used for, in the last sentence of your stipulated testimony, paragraph 75, that you have also used them for the purpose of changing the level of prices in territories surrounding a number of your mills?

A. If this low figure that we find affects the destinations in and around our mill naturally we use it as a figure—as a point to start figuring with. If that reflects a change of price in the territory, we quote that we think is the lowest price based on what we find.

Trial Examiner Norwood: Well, now, I think you are not answering his question there. I am going to ask the Reporter to read the question, and ask you to make a direct answer "yes" or "no."

Read the question.

(Question read.)

Mr. Withrow: Your Honor, now—

40567 Trial Examiner Norwood: Now, please do not interrupt. Let him give the answer and you can make a statement.

I have had the question read here. I do not want the thing confused, and I want him to answer it.

Answer the question, first. Did you use them for that purpose, or did you not?

The Witness: We used it, as I said before, to arrive at the low price we could find. Now, naturally, it is going to affect destinations around our mills if a change has taken place in that particular area.

Trial Examiner Norwood: Did you use them for that purpose, or did you not use them for that purpose?

The Witness: I think it has to be answered "yes" and "no."

Trial Examiner Norwood: Did it have that effect?

The Witness: As I see it, yes, it had the effect of being "yes" or "no," if you want me to answer it that way.

Trial Examiner Norwood: In some cases, then, it did have the effect of raising the price level in the vicinity of your mill; is that right?

The Witness: Certainly.

40568 By Mr. MacIntyre:

Q. Mr. Dawson, isn't it a fact that your company has instituted basing-point prices at a number of its mills

for the purpose of changing the price level in all of the surrounding territories of those mills?

A. Well, will you tell me how large an area you want to speak about now?

Q. As far territory as the change permitted itself to run.

A. Yes. We have put in base prices that changed
40569 price levels.

Q. And you had not theretofore found that prices generally in those territories reflected such bases at your mill; is that correct?

A. Why, if we made a base price and send it out and let it run, naturally it is going to affect the destination price.

Q. Such as you had never found; is that correct?

A. Well, if we established them we do not care what the other fellow had or not; they might be lower, and naturally were lower.

Q. Isn't that an additional purpose for which basing points are used,—that is, in addition to the one that you have mentioned in the last sentence of your stipulated testimony, paragraph 75?

A. No, I would not say so.

Q. How do you reconcile that with the testimony that you have just given, that you have used that for the purpose of changing the price levels?

A. In addition to changing the price level, we figure in putting in a basing point we were going to get a geographical advantage.

Q. Such as you had not had before; is that correct?

A. We had had experiences where they were; yes.

Q. Did you establish such basing points for any other reason than to give you the so-called geographical
40570 advantage which you had not theretofore enjoyed?

A. That is the main thing.

Q. Well, you say "the main thing." What about the others that are not so main, in your opinion?

A. Well, I would say just offhand that that is the object in putting in the base.

Q. Any other object?

A. Well, I am going to say that we wanted to experiment and see what the effect would be under the present condition when we have put in the base price at the
40571 mills, and that was strictly on the basis of taking advantage of any geographical advantage we might have.

By Mr. MacIntyre:

Q. You cannot think of any other reason?

A. I think that is sufficient reason.

Q. I call your attention to Commission's Exhibit 970-15-J; do you recognize that as one of the pages of your reply to the so-called Clark and Burns questionnaires?

40572 The Witness: No, I do not recognize it.

Mr. Withrow: From that page, you do not recognize it?

By Mr. MacIntyre:

Q. Well, do you recognize that as part of the questionnaire for mill 253,—for a mill located at Silica, Ohio?

A. Yes, I do, on this particular page here.

Mr. Withrow: What page is that? What exhibit?

The Witness: 27—970-14. What is this?

Mr. MacIntyre: U.

The Witness: U, I believe—970-14-U.

By Mr. MacIntyre:

Q. Your company is the only one that has a mill at Silica, Ohio, isn't it?

A. That is right.

40574 Q. Mr. Dawson, how do you reconcile the testimony that you have given as to the purpose for which you institute basing-point prices at your mill—that is, the answer you have given this morning with the statement that appears on Commission's Exhibit 970-15-J, to the effect that those basing-point prices were instituted by your company for the purpose as "an attempt to stabilize prices"?

A. I cannot reconcile.

Q. You cannot reconcile it?

A. No.

Mr. Withrow: I object to the question and move to have it stricken because it improperly states Commission's Exhibit 970-15-J, and I do not think any witness should be asked to reconcile an improper statement in the record.

Trial Examiner Norwood: Well, I was ready to sustain Counsel's objection if he had done it before the

40575 answer came in.

Mr. Withrow: Well, I was on my feet but the witness answered first. The objection was timely, and I move to strike both the question and the answer.

Mr. MacIntyre: The record shows, if Your Honor please, that this is a questionnaire reply.

Trial Examiner Norwood: I think, Mr. MacIntyre, that that is our painful duty to reconcile this testimony.

Mr. MacIntyre: I am giving the witness an opportunity.

Trial Examiner Norwood: And I do not think that he has the obligation at all to reconcile it with some other evidence that is in the case somewhere else. You have asked him as to the facts, and you may ask him if he knows whether his company took a different position than what that position was.

I think I will allow that motion.

Mr. Withrow: Thank you, Your Honor.

Mr. MacIntyre: I want to point out, if Your Honor please, that the witness has purported to answer entirely for his company. The record shows that his company has made a conflicting and contradictory statement, and I am attempting to ask him now—

Trial Examiner Norwood: You can cite that in your brief to show it is a conflicting and contradictory
40576 statement, if it is.

By Mr. MacIntyre:

Q. Well, under the circumstances that transpired, Mr. Dawson, do you now wish to make any modification in the testimony you have given this morning concerning the institution of basing-point prices by your company and the reasons for the same?

Mr. Withrow: Just a minute.

I object to the question. I think Mr. MacIntyre should explain what he means "under the circumstances." Does he mean under the circumstances of the discussion we have just had here? I must confess it is not clear to me, and unless it is I object to the question as improper in form, and unfair.

Trial Examiner Norwood: I think he should answer that.

The objection is overruled.

Mr. Withrow: Well, if he would strike the first part of it,—"under the circumstances,"—I think it would be not objectionable.

Mr. MacIntyre: The circumstances as shown by the record in this case over the last 30 minutes.

Mr. Withrow: Now, you see—

Trial Examiner Norwood: You answer that with respect to any circumstances within your knowledge.

A. No, I do not change my testimony.

40577 By Mr. MacIntyre:

Q. Now, referring to the last sentence of your stipulated testimony, paragraph 78, you stated there that you attempted to keep your prices low enough so as to not encourage distant mills to invade the markets where Medusa sells cements, or of the building of new or expansion of old mills. It is a fact that your prices have not been low enough to prevent shipments by your competitors into areas adjacent to your mill; is that correct?

A. No, it is not. In fact, it is not a hundred percent. I think we would discourage shipments in there.

Q. I used the word "prevent" there.

A. No, I do not think it has prevented it.

Q. They have not been low enough to prevent them coming into Sandusky on some shipments?

A. There is cement coming in there from the outside, yes.

Q. Some of your competitors ship cement into York, Pa.?

A. Yes, I think that is true.

Q. And at the level of prices at which your company has continued to sell cement in its shipments from York, Pa., mill, there has been a new mill to be built into eastern Pennsylvania since the depression set in in 1932; is that right?

40578 A. Yes. A mill has been built there.

40579 Q. Now, referring to the last sentence of your stipulated testimony, paragraph 80, you have stated that your policy of quoting prices was for the purpose of securing the full advantage of the geographical location of your mill?

A. That is right.

Q. In that connection you get the full advantage of price; is that correct?

A. We get the full amount of our base, and we also expect to get added tonnage.

Q. Well, you do not mean to say that you get all possible benefits of the geographical location as to tonnage since, as you testified a few moments ago, others do ship into, say, Sandusky and York, right in beside your mill?

A. We do not get all, but we have improved our position, we feel.

Q. But you do get the full advantage as to price?

A. Yes.

Q. Now, you have stated, on that same point, in your stipulated testimony, paragraph 83, that a reduction of 23 cents per barrel in price in the Manitowoc district
40580 had the effect of substantially eliminating your competitors from that market. If it worked so well in that direction, in that instance, why didn't you try it out at York, Pa.?

A. What paragraph was that, Mr. MacIntyre?

Q. Near the end of paragraph 81.

A. Eighty-one? This 23-cent differential was in existence when the Manitowoc plant was first organized. York was not in existence at that time.

Q. Well, I know that it has been since, but since your policy there at Manitowoc had the effect, as you say in that testimony that it had, why haven't you since tried it out at York?

A. We have a base at York now.

Q. When was it established?

A. 1939.

Q. Why didn't you try it out before then?

A. Well, we more or less—in fact, we have been price followers practically all the time. We put that base in in 1939 for the purpose of trying to get the geographical advantages, tonnage, in that section.

Q. Which you had not theretofore secured?

A. We had always enjoyed a good market around York, but we thought we might be able to get a better advantage.

Q. Which you had not gotten before; is that correct?

A. Oh, that is hard to say. I think we had a
40581 very substantial amount of tonnage in York.

Q. Yes, but you would not have put it in to get an advantage that you already had, would you?

A. No. I think we would put it in to improve and get some more, if we possibly could.

Q. Get some additional advantage?

A. Yes.

Q. Well, now, since you say in this stipulated testimony that you found that to be the result of the policy adopted at Manitowoc, why didn't you adopt it earlier at York—that is, before 1939?

A. For the reason that we were trying to get as much as we possibly get working on the delivered-price basis of meeting the other fellow's base.

Q. Instead of attempting to get all these advantages by putting in a mill price; is that correct?

A. It was entirely experimental, trying to find out what we could do.

Q. You had experimented in that respect in Manitowoc in 1924, hadn't you?

A. Yes; that is right.

Q. And found it to have the effect you say it had had in your stipulated testimony, paragraph 81?

A. We had very good results.

Q.—And yet you let 15 years elapse before you
40582 tried it at York.

A. Well, the situation is just a little different in York. We were up there at a location quite distant from any other mill. At York it is different from that; the same as our other mills.

Q. It is nearer Wilmington and Chester, Pa., than any other mill, isn't it?

A. What is that?

Q. Your mill at York.

A. Is nearer where?

Q. Chester, Pa., and Wilmington, Del.

A. Than any other mill?

Q. Yes.

A. Well, I cannot give you the exact location. I cannot visualize the exact location of Chester and Wilmington as compared with other mills.

Q. Now, you told us when you established the base at the York mill. When did you establish the base at the Wampum mill which you referred to in the first line of your stipulated testimony, paragraph 84?

A. That base was put in in 1939.

Q. For the same reason and considerations that one was established at York?

A. Yes, to try to get some geographical advantage.

40585 Q. Mr. Dawson, have you established a base price at Bay Bridge, Ohio, in recent years?

A. Yes, we have.

Mr. Withrow: He is asking about the last time he established one. Why not make it the last time prior to July 1, 1937, then we will know.

Trial Examiner Norwood: I will let the witness answer with respect to that period prior to the complaint.

A. There were bases—we had a base at Bay Bridge prior to the date of the complaint.

40586 By Mr. MacIntyre:

Q. When?

A. I believe it was about 1930.

Q. How long did it run?

A. Not very long. I can't give you the exact period.

Q. 1931?

A. I do not recall 1931 or 1932. It is my recollection it was just a short period.

Q. Well, is it your testimony you did not have a base there between 1932 and 1937?

A. I think that is correct.

Q. Why not?

A. The reason is the price was pretty low down there for a while. We were trying to get as much as we possibly could for our cement and still meet the lowest price that we could find in the field.

Q. According to Respondents' Exhibit 3165, you were securing mill nets from customers five miles from the mill at $1.69 a barrel in 1937. You wanted to get that much of a price from your customers in that particular locality is the reason you did not put a base in there; is that correct?

A. We wanted to get as much as we possibly could and still be competitive.

Q. Well, isn't that one of the reasons you did not put one in there?

40587 The Witness: May I have the question?

Trial Examiner Norwood: Read it.

(Last question read.)

The Witness: The question before that.

(The next-to-the-last question was read.)

A. We wanted to get as much as we could, and we charged the price that reflected this $1.69.

By Mr. MacIntyre:

Q. Why haven't you put one in at Dixon? Why didn't you put a base in there?

A. What period are you referring to now, Mr. MacIntyre?

Q. At any time during the period July, 1932, and July, 1937.

A. I believe we did have a base in there.

Q. Throughout that period of time?

A. We had a base in there the same as in the case of Bay Bridge. Prices became so low that it was inoperative.

Q. So you had no operating base there between 1932 and 1937; is that correct?

A. I think that is correct.

Q. Well, why didn't you put one in there that would be effective for that period of time?

A. For the same reason that I explained the case of Bay Bridge: The price was too low.

Q. Was Silica a base between 1932 and 1937?

A. It might have been the early part of 1932, but
40588 not very long. I think it was all confined to '31.

Q. Why wasn't it a base during that period?

A. For the same reason that—

Q. As to Bay Bridge?

A. As to Bay Bridge.

Q. Now, referring to testimony in your stipulation, paragrah 88, you say that today all of the mills of the Medusa Company are so-called base mills. When did Bay Bridge become one?

A. I believe it was July, 1939.

Q. When did Dixon become one?

A. The same time.

Q. Well, is that the same month for York?

A. Yes.

Q. And Wampum?

A. Yes.

40589 Mr. MacIntyre: Now, for Your Honor's information, referring to the last sentence of the stipulated testimony in paragraph 89:

By Mr. MacIntyre:

Q. Mr. Dawson, can you cite me any instances where your company has quoted a price on a delivered price basis less than the equivalent of a basing-point price plus railroad freight other than in the City of Cleveland?

A. Yes, there is some flat prices would be less than the base plus freight.

By Mr. MacIntyre:

Q. Can you cite any instances where those have been effective other than the Lower Peninsula of Michigan and the City of Cleveland; that is, in recent years?

A. Yes. I recall there was a flat price in Baltimore.

40590 Q. Any other?

A. My recollection is there was one in Washington.

Q. Can you give instances as to the period since 1932, other than the instances in Michigan, the Lower Peninsula, the City of Cleveland, Baltimore, where your prices as quoted on a delivered price basis have been lower than a price plus rail freight?

A. Of course, I am assuming that— Do I understand that you are referring to a base in one locality? I have in mind now Milwaukee, for instance. We had a price there, as I recall, that was less than the base price plus freight?

Q. From where?

A. From Milwaukee into the surrounding area there. I think we put a flat price on there.

Q. Is that the only additional instance that you can recall?

A. I think Cincinnati had a flat price at one time.

Q. You told us yesterday that you did not think it occurred since 1932.

A. Well, I think that is right.

Q. Can you think of any that occurred since then,— any other locations than those you mentioned?

A. Offhand, that is as many as I can recall.

Q. Now, apropos the last sentence in your stipulated testimony, paragraph 88, I want to ask you whether or not you recognize the signature appearing at the bottom

40591 of Commission's Exhibit 1814-A as that of Mr. Vanderwerp, vice-president of your company.

A. Yes, this is Mr. Vanderwerp's signature.

Q. And what is his position in your company?

Mr. Withrow: Now or at the time he wrote the letter?

Mr. MacIntyre: Well, at the time he wrote that letter.

A. In 1931 Mr. Vanderwerp was supervisor of sales in the Wisconsin-Illinois district.

By Mr. MacIntyre:

Q. Vice-president of the company?

A. Yes, he carries his title through, but he is really a supervisor of sales.

Q. And how long has he been with your company?

A. Oh, Mr. Vanderwerp has been with us, of course, since he joined Medusa in 1929, at the time of the consolidation. He was with the subsidiary companies for 23 years, I would judge.

Q. In other words, he is a man experienced in the marketing of cement for a period of more than 23 years?

A. He was at that time. He was—well, I would say part of his time was on production and part on sale.

Q. He had experience in cement manufacturing and marketing for a period of 23 years?

A. Pretty close to that.

40592 Q. And ever since your company came into being he has been with it?

A. Yes. He came with Medusa at the time of the consolidation.

Q. What are the reasons why your company opposes and tries to prevent diversions of cement in transit?

A. The reason that we found cases where the cement diverted in transit gets into—gets to a destination which is conflicting with a dealer at that particular destination.

Q. And in sales at different prices than those you quoted there?

A. That is usually the cause of the diversion, if any.

Q. Well, that is the fact, isn't it?

A. Yes. They buy at the lower price based on a particular destination and have it diverted to a destination higher price and undersell our regular dealer at the higher price destination.

Q. But the fact of the diversion itself does not result in you securing any lower mill net on that shipment than would have been the case if it had not been diverted, is that correct?

A. We got the mill net based on the original—

40594 Q. Will you please answer my last question?

The Witness: May I have the last question, please?

(Question read.)

A. That is correct.

By Mr. MacIntyre:

Q. Mr. Dawson, would you say that Medusa would be able to compete with other manufacturers if it did not use the basing-point system?

A. Yes.

Q. Then, why do you use the method of quoting delivered prices?

A. We quote what we find is the lowest price at destinations.

Q. Well, why do you quote—

Mr. Withrow: Let the witness finish his answer.

A. (Continuing.) And we determine that by means of our field force in the sales department.

40595 By Mr. MacIntyre:

Q. Why don't you quote f.o.b. mill such as was the case when Governor Horner asked you to quote f.o.b. mill?

A. Well, very few dealers or contractors, if any, have ever asked us to quote f.o.b. mill. They are interested in destination prices.

Q. Well, I am asking you, though, why your company did not quote f.o.b. mill as Governor Horner requested in 1933 and as is evidenced by Commission's Exhibit 1895-A and B, Mr. John's letter.

40598 A. The exhibit referred to answers that question completely.

Q. And you want to use that as your answer now?

A. I do.

40603 "Q. Mr. Dawson, when have you used or heard anyone in the cement industry use the phrase 'having a customer' in connection with reference to the Federal Government as a purchaser of cement from cement manufacturers?")

A. I do not understand that question, Your Honor.

By Mr. MacIntyre:

Q. When did you ever use that phrase previous
40604 the time you used it in the testimony, Mr. Dawson?

A. The phrase referring to the customer?

Q. The phrase "having a customer."

A. "Having a customer"—

Trial Examiner Norwood: The way it is used in that paper.

The Witness: I am trying to locate that.

Mr. Withrow: It is in the last sentence, Mr. Dawson, of the paragraph.

The Witness: Ninety what?

Mr. Withrow: Ninety-nine.

A. I do not know as I have ever heard any competitor use that same term. It is one I have used myself at times.

By Mr. MacIntyre:

Q. Have you ever used it with the special meaning so as to require quotations as it is used there previous to the time that it was placed in this stipulated testimony?

A. No. I think it is more or less my own phrase.

Q. Did you see that phrase before it was typed into this stipulated testimony?

Mr. Withrow: Your Honor, I object. I do not see that this is relevant and material. Asking him what he means by it, we have no objection, but this line is immaterial and irrelevant to any of the issues raised by the pleadings.

40605 Trial Examiner Norwood: Objection overruled. He may tell us about that.

A. Why, practically all of the information here was dictated or discussed, and I think perhaps that is part of my dictation.

By Mr. MacIntyre:

Q. Well, it is your testimony that it is part of your dictation?

A. Yes. I thing I am right on that.

Q. Did you dictate all the matters set forth in the stipulated testimony?

A. Oh, no.

Mr. Withrow: Your Honor, I object to this line of procedure. It must be apparent that stipulations are drafted by lawyers and checked by the witness. They are meant to be summaries.

Redirect Examination by Mr. Withrow.

Q. Mr. Dawson, on cross-examination Mr. MacIntyre asked you a number of questions about shipments made for dealers, warehouse stock, within 15 days after a price
40606 increase. Do you recall that cross-examination?

A. Yes, I recall. I do not remember the exact question. I remember the idea.

Q. Now, would you tell us whether or no the dealer has to take any action prior to the effective date of a price increase in order to get shipment within 15 days?

A. Well, he has to give notice.

Q. And place an order or enter into a contract?

A. And place an order.

Q. Now—

Q. Now, with reference to these contracts and the invoices on contract shipments, do you have to know the date the contract is entered into in order to determine whether or not the price at which the cement is invoiced on the contract shipment is a going market price?

A. No. We identify the contract by number, and have a work sheet, so we have a complete record on this
40607 work sheet, showing the price originally, and then it is mentioned as price changes take place downward. If there is an increase in price it has no effect so far as the contract shipment is concerned.

Q. Then the invoice, when it is made out, has the price opposite that contract number inserted on the invoice; is that correct?

A. The contract number and price are both shown on the invoice.

Trial Examiner Norwood: The contract price?

The Witness: Yes. It is invoiced at the contract price.

By Mr. Withrow:

Q. And on the invoices which you have I believe you said that the contract number is always included; is that right?

A. That is shown on the invoice.

Q. Now, Mr. MacIntyre also asked you about the question of prepaying freight both in connection with rail and truck shipments, and he asked you for all the points where you prepaid freight on rail or truck shipments, and you gave some of them. Will you tell us what your practice has been in the territory say fifty or sixty miles around Milwaukee with reference to prepaying freight?

A. Well, there is an area, I think it runs sixty miles around Milwaukee, where we do. Then after I testified the other day I recalled that we prepaid freight in the
40608 State of Michigan. I did not mention that, the Lower Peninsula.

Q. How about it,—do you do it in any area surrounding Toledo?

A. Yes, I mentioned Toledo.

Q. The area surrounding.

A. I might mention Toledo as a town, but I was referring to the area immediately around Toledo.

Q. And what has been your practice with reference to prepaying freight on shipments to the United States Government, do you know, when they bought f.o.b. destination?

A. I think on United States Government bills of lading they pay the freight now; that is just my recollection, I am not certain about that.

Q. And what is the practice on commercial bills of lading when shipments are made on commercial bills of lading?

A. The customer pays the freight.

Q. And does the same thing apply on shipments to State Governments?

A. Yes, they generally prepay the freight unless it is a prepay station. Now, I am referring to the period prior to January of this year.

Q. Now, Mr. Dawson, I would like to call your attention to record page 40345, starting with line 2, and running through line 11, and ask you if this is a correct transcription of your testimony, and if it is whether you want
40609 to amplify it in any way, starting with question two. You may have to look back at the preceding page, if it is necessary, to understand the line of question.

(The witness examines the transcript.)

Q. Maybe I could simplify that, Mr. Dawson, by this question: In that first question at line 2, in your answer to it, were you testifying as to where you found trucking competition or where you found the practice of prepaying freight?

A. The practice of prepaying freight. I gather that is the thought coming through here.

Q. So to understand your testimony correctly, you were not testifying at that time at the points you mentioned were the only points where you found truck competition?

A. That is right.

Q. Well, that is sufficient.

A. I was wondering about this question. It does not seem right here, as it was given.

Q. Mr. Dawson, would you tell us what the policy has been of the Medusa Company with reference to making sales in the City of Cleveland? Does it sell only in carload lots or less than carload?

A. We sell both in car lots, mixed car lots, and by truck.

Q. And in truck, they do not have to take a full rail car?

A. That is right.

Q. And how does the price compare on shipments
40610 by truck in less than car lots as against a shipment by truck of a full car lot?

A. We charge the same price.

Q. Mr. Dawson, do you recall that Mr. MacIntyre asked you some questions about Commission's Exhibit 1394; that was an inquiry for cement to be used anywhere in Ohio or West Virginia. Do you recall that testimony?

A. Yes, I do.

Q. Would you tell us whether or not in making your answer you considered the question of whether the cement requested there was a standard Portland cement?

Q. Did you consider that in making your answer?

A. No, I did not.

Q. Has the Medusa Company ever had an agreement with any of its competitors to refuse to bid f.o.b. mill?

A. Never had.

Q. Now, Mr. MacIntyre asked you something about some requests by the State of Illinois for bids in
40611 1933. Do you recall your testimony on that?

A. Yes, I do.

Q. And do you recall now ever having received from the State of Illinois a request for only f.o.b. mill bids?

A. No, I do not.

Q. I show you Commission's Exhibit 1887, and ask you to look through this form and tell us whether or not it is the usual form in which the Medusa Company has received requests for bids from the State of Illinois?

40612 A. Yes. This looks as though it is the regular form. I have not read it word for word, but just from the appearance, going through it, it seems to contain the standard provisions Illinois used.

Trial Examiner Norwood: You may have a re-examination on that point.

The Witness: I have not attempted to read it over; just glancing through it.

By Mr. Withrow:

Q. And that is for f. o. b. destination prices?

A. Yes. I notice in this case it is.

Q. Now, I will direct your attention to— —.

A. It is not destination. It is county seats.

Q. But not a request for f. o. b. mill prices?

A. No.

Q. Now, I will show you Commission's Exhibit 1894, and ask you to tell us, if you know, whether this is a copy of the letter which Mr. J. B. John answered, and which is in evidence as Commission's Exhibit 1895-A and B?

40613 A. Yes.

Q. And was that letter, Commission's Exhibit 1894, submitted to you in connection with a request for a bid by you on a quantity of cement from the State of Illinois?

A. No, this was not submitted with a bid or invitation to bid.

By Mr. Withrow:

Q. Now, do you recall your testimony, Mr. Daw-
40614 son, concerning an invitation to bid at Rolling Fork, Miss.?

A. Yes, I do.

Q. And would you tell us whether or not the Medusa Company could have rendered as good service from the standpoint of time at Rolling Fork, Miss., as some of the other cement companies?

A. No, we could not.

Q. And would you tell us why not?

A. Because of the distance from Dixon, Ill., to Rolling Fork, Miss., as compared with mills in the southern part of the country.

Q. Now, Mr. MacIntyre asked you about why you did not bid f. o. b. mill bid even though the destination was beyond your marketing area. Do you recall that cross-examination?

A. Yes, I recall that.

Q. Now, would you tell us if there is any expense involved in the Medusa Company's making out and filing a

bid even though it has no opportunity to receive the award?

A. Yes. In addition to the clerical—the time of the clerical force in the office you have to submit a bond. I do not know just what the bond costs, but there is some little expense to it.

Q. Now, do you recall, Mr. Dawson, your testimony about this Respondents' Exhibit 3180, that is the contract between the Wisconsin State Highway Department and the Manitowoc Portland Cement Company?

40615 A. I do.

Q. Was this figure of 90 cents f. o. b. your mill contained in the bid you submitted to the State of Wisconsin?

A. No, I don't think it was.

Q. I believe there was some testimony about you and Mr. John going to Madison and negotiating it; is that correct?

A. That is correct. I might add that Mr. Vanderwerp was in on that, also.

Q. Now, you also were asked about the sales expense on that 90-cent contract. How do you reconcile three executives of the company being there in your statement of sales expense?

A. Well, we figured that the executives are administrative expense.

Q. So there was no salesman contacting the State; is that what you mean?

A. That is right. I might add that there was expense from the standpoint of the salesman serving the job. There is more or less some requests for salesmen to do certain things, and we had to give them that consideration.

Q. Now, has there ever been a time, Mr. Dawson, when Medusa Company had any assurance that its competitors would not quote below Medusa's lowest quoted market price?

40616 A. No.

Q. Or has there ever been a time when it had any assurance that any given competitor would not quote below that competitor's quoted price?

A. No.

Q. Now, you also testified about the same time that you had this 90-cent f. o. b. mill price at Manitowoc that the delivered price in Milwaukee was 90 cents per barrel. Do you recall that?

A. I do.

Q. Would you tell us, if you know, whether that 90-cent price applied f. o. b. silo and delivered, or was it just delivered?

A. That was delivered, and, if I am not mistaken, destinations were announced where it would be delivered.

Q. Now, was that figure of 90 cents, did that reflect or could it be rationalized on some basis of some base plus rail freight?

A. No, I don't think so.

Q. And on a sale by the Manitowoc Company in Milwaukee, approximately what would have been the net at Manitowoc, if you know?

A. Figuring back the transportation charges by rail or by truck?

Q. Well, by the way you would take it. Well, make it by rail; that is the easiest.

40617 A. Based on a 90-cent delivered?

Q. That is right.

A. Let's see; that was in 1932, I believe.

Q. 1932. Give us just an approximate figure.

A. Well, I had a certain thing in mind there; I was trying to get.

40620 Q. Now, Mr. Dawson, do you recall that Mr. MacIntyre asked you about the nets which you had received on shipments to Fremont, Ohio?

A. Yes, I recall.

Q. In connection with that testimony, did you take into consideration the fact, if it is a fact, that the freight rate to Fremont from Bay Bridge, Silica, and Toledo, were all the same?

A. I did not have the rates in front of me, and I could not tell what they were. In fact, I did not know what the rates were to Fremont from these points.

Q. And on your examination, I believe, you and Mr. MacIntyre were talking about delivered prices in the area around the mill, Bay Bridge mill, which reflected the Cleveland base. Would you tell us whether or not in that connection you considered that the delivered prices in that area might reflect a base at Toledo, Ohio?

A. Well, that is possible. If I had the Toledo base and the Cleveland base at the same time, and the rates,

40621 I could soon tell whether Cleveland and Toledo applied.

Q. Now, Mr. Dawson, I show you again Respondents' Exhibit 3163-A to C, for identification, and on cross-examination Mr. MacIntyre asked you a number of questions about that. I would like to ask you one or two on redirect.

Now, has an instance ever come to your attention where the dealers located at those towns have taken deliveries at their warehouses located in those towns, and then come into competition in efforts to sell the cement which had been delivered to the warehouses in the towns listed on Respondents' Exhibit 3163-A to C?

A. No, not going to warehouses.

40623 Q. Mr. Dawson, when you sell to dealers, regardless of the location of their warehouse, for delivery in one town, do you quote them the same or different prices f. o. b. that town?

A. If they are both in the same town, we quote them the same price.

Q. Now, do you recall, Mr. Dawson, when the Manitowoc Company built the silo in Chicago?

A. Yes, I do.

Q. Would you tell us the reasons why it was built?

A. Well, we wanted to get a distribution and a representation in the City of Chicago so we would meet the truck delivery of some of our competitors, at least one of our competitors.

40624 Q. Did you build it in connection with your plan for boat operation from Manitowoc to Chicago?

A. Oh, naturally, yes.

Q. Has the Manitowoc silo ever been part of your method of distribution by rail? In other words, shipping by rail from Manitowoc and repacking it from the silo and shipping it from the silo to Chicago?

A. No, not to Chicago.

40625 Q. Well, is the cost of silos in Chicago a common factor with reference to both rail and truck deliveries by the Manitowoc Company?

Q. I mean is the cost of the silo a part of the

40626 cost of your marketing by rail in Chicago and also a factor on the complete cost of your marketing by boat and by truck?

A. Well, a silo is constructed primarily to take care of boat delivery, not to take rail delivery to the silo and then repacked there. The cost of operating the silo, investment, is a factor.

Q. In boat delivery?

A. That is right.

Q. Is it a factor on a shipment by rail to a customer from Manitowoc to Chicago?

A. No, it does not enter into straight rail.

Trial Examiner Norwood: Well, do you make such shipments as that while you have the silo there?

The Witness: We did some years ago.

By Mr. Withrow:

Q. Mr. MacIntyre went into the question of your sales expense in 1932 and 1933.

Mr. Dawson, was the sales force of the Medusa Company curtailed in any way at that time?

A. In 1932 and 1933 there was a reduction in our sales force.

Q. And did that have any effect on the sales cost?

A. Well, if you put it on a per-barrel basis the cost per barrel was higher in those days even with the reduced force because of the small amount of volume.

10627 Q. Would you tell us, Mr. Dawson, whether in checking the price increase that Mr. MacIntyre asked you about this morning, or, rather, I will make that price change; that is, the one in Michigan, whether or not your salesmen checked the delivered price in Detroit?

A. Sure, they did.

Q. And Grand Rapids?

A. Yes.

Q. When they check these destinations which

10628 destination did they check, the small towns or the large towns?

A. Why, they usually check the larger points, or larger markets.

Q. And what proportion of the cement shipments by the Medusa Company go to these larger markets as compared to the smaller?

A. Oh, I do not know as I could answer that to give you the proportion of shipments to the large markets without having a detailed classification of our shipments by towns. Of course, we do check the small markets as well, but we start in and check the large markets.

Trial Examiner Norwood: Well, would the small market be just as good an index as to the price in a given territory as the large market?

The Witness: What we do is to try to get the pattern.

Trial Examiner Norwood: Well, wouldn't a small market give you a pattern as well as the large market?

The Witness: Surely, only that there is a larger amount shipped to the larger market at one time,—larger buyers are there.

Trial Examiner Norwood: But that would not make any difference in checking what the prices were?

The Witness: Oh, no. As I say, we check the smaller markets as well.

By Mr. Withrow:

40629 Q. Well, would you tell us your reasons for checking the larger markets first?

A. Because there are larger buyers in the large markets. We want to be competitive with the large buyers.

Q. Now, Mr. MacIntyre asked you concerning the price concessions made by either your company of which you found in the market from July 1, 1932, to July 1, 1937. Do you recall his cross-examination?

A. I do.

Q. Would you tell us what the policy of the Medusa Company was with reference to making price concessions during the N. R. A. Code period—that is, from December 12, 1933, to May 27, 1935?

A. I do not think there were any concessions made during that period. My testimony yesterday excluded the Code period.

Q. Now, Mr. MacIntyre also asked you if the Medusa Company ever attempted to make sales at more than the lowest delivered price which you found in the market. Do you recall that cross-examination?

A. Yes.

Q. Was there ever a time when Medusa issued quotations in Cleveland which were higher than the lowest price quoted by their competitors?

A. Yes.

Q. In at least one instance those quotations never 40630 became effective, I believe you stated?

A. That is correct.

Q. Was the Medusa Company able to make any sales at this higher figure?

A. No, we were not.

Q. Now, Mr. Dawson, what are the duties of a salesman

of the Medusa Company in connection with a call on a dealer customer or prospective customer of the Medusa Company?

A. To inquire about his needs for cement, and, naturally, to determine what the possibilities are for future tonnage, and to render any service it is possible for us to render with the dealer.

40631 Q. Would you tell us whether or not, Mr. Dawson, a salesman of the Medusa Company is required
40632 to ascertain what the lowest quoted price is from the various dealers as he makes his regular calls on the trade?

A. Yes. That is one of their duties. You spoke of service here a while ago. I did not identify the question.

Q. So that over a period of time, Mr. Dawson, would you tell us whether or not the Medusa Company does not check all of the destinations where it quotes delivered prices?

A. At some times, yes, they check, naturally, when salesmen make calls.

Q. Now, Mr. Dawson, Mr. MacIntyre asked you concerning the prices which were not either zone prices or could be rationalized on the basis of some base plus freight. Do you recall that cross-examination?

A. I do.

Q. And he asked you to list any such prices. Did the Medusa Company ever meet any so-called arbitrary or special prices which were in effect along the eastern seaboard of the United States?

A. Yes, I think we did.

Q. And were they zone prices, or could they be calculated?

A. I would not consider it a zone price. I think
40633 it was more of a flat price, as I recall.

Q. Does the Medusa Company, Mr. Dawson, have any policy with reference to sending price or sales information to competitors?

A. No, we do not.

Q. Mr. Dawson, in connection with specific job contracts which are entered into, do your salesmen check the job to see if they need the cement that the contract refers to?

A. Yes, that is the regular procedure of a salesman.

Q. Does that have anything to do or does that depend

upon the Institute in any way having a contract reporting service?

A. No, nothing whatever.

Q. Now, you testified this morning with reference to Medusa discontinuing reporting of contract service for a while during 1930, and it was not clear in my mind whether you referred to Medusa discontinuing it or the Institute discontinuing the service. Would you tell us what you meant?

A. I was referring to Medusa.

40635 Q. I would like to show you Respondents' Exhibit 3187-A and B, and ask you if that is a copy of a price announcement sent by the Crescent Portland Cement Company to dealers in the Pittsburgh metropolitan area in 1931?

A. Yes, it is.

Q. I will show you Respondents' Exhibit 3188 and ask you if that is a letter you received from a company that warehoused your cement in Pittsburgh?

A. Yes, it is.

Trial Examiner Norwood: Can he describe those generally and give the Commission a chance to waive the identification?

40636 By Mr. Withrow:

Q. I will show you—

Mr. Withrow: Every time we do that it takes a little longer, but I will be very glad to take the suggestion, and I will offer in evidence at this time Respondents' Exhibits 3187 through 3195-A to Z-2, with the statement that if they do object to the identification I reserve the right, of course, to ask the witness concerning them.

40637 Mr. MacIntyre: I can say that we concede as to Respondents' Exhibits 3187 to 3195, inclusive, that the witness would testify that they are what they are shown on their face to be.

40639 I wish to further offer in evidence at this time Respondents' Exhibits 3160, Counsel for the Commission having waived by their use of the document on cross-examination any objection on any grounds whatsoever.

Trial Examiner Norwood: That proffer is rejected.

40641 *Examination On Voir Dire by Mr. MacIntyre.*

Q. Mr. Dawson, referring you to Respondents' Exhibit, for identification, 3195-A to Z-2, inclusive, can you point out to me any one of those invoices that provide for a delivery of cement that was sold by your company on any basis other than a delivered-price quotation, whether delivery was made by a truck or rail?

40643 Mr. Withrow: We concede the fact.

(Question read.)

Trial Examiner Norwood: You concede the fact?

Mr. Withrow: They cover delivered sales, yes.

Trial Examiner Norwood: Proceed.

By Mr. MacIntyre:

Q. You can't find any that do?

A. No, I can't.

Trial Examiner Norwood: The Counsel has made a statement that covers that.

By Mr. MacIntyre:

Q. Now, do any of those invoices included in that list show that your company quoted a different price to a customer in that town on one day from a price it quoted the same customer or different customers in that town on the same day, or prices different from any of your competitors in that town on any given day?

Mr. Withrow: May I have the question read?

Trial Examiner Norwood. Read it.

(Question read.)

Mr. Withrow: I object to the question.

Trial Examiner Norwood: Objection overruled.

A. The invoices are our current price on the
40644 date of the invoice. I can't tell you what our competitors' prices were on that same date.

By Mr. MacIntyre:

Q. Can you determine from the invoices whether or not that you quoted your customer or any of your customers in that town on any given day different prices from what you quoted any other customer?

The Witness: May I have that question again?

Trial Examiner Norwood: Read it.

(Question read.)

A. In the same town?

By Mr. MacIntyre:

Q. Yes.

A. No, the price on this invoice won't indicate what we quoted to another customer, but if this is the going price that particular day in this locality, then the same—the other customer, if he is our customer, has the same price.

Q. Well, now, you say if that is a going price on that day. Can you tell me with certainty whether or not the price shown on the invoices were the going prices in that town on the day shown in that invoice?

A. Yes, this is the going price on the day of the invoice.

Q. How do you know that?

A. Because we have our quotations, that is the low price, and we invoice accordingly, with the exception of contract. Anything in the way of contract carries
40645 a lesser price.

Redirect Examination (Continued) by Mr. Withrow.

Q. The destination is what, Mr. Dawson?

A. Solon, as I recall.

Q. And how large a town is that?

A. Very, very small.

Q. Do you know whether or not you have any dealer other than the Solon Builders Supply Company—Lumber & Supply Company?

A. That is the only one that I know of.

Q. Do you know of any other building supply dealer in that town?

A. Not to my knowledge. There is only one.

Q. And that town is near Cleveland?

A. That is true.

Mr. Withrow: That is all.

Examination on Voir Dire (Resumed) by Mr. MacIntyre.

40646 Q. I understood you to say, Mr. Dawson, that you could tell from those invoices that the price shown on the face was the going price in that town on the day shown on the invoice; is that correct?

A. That is right.

Q. Well, now, I will ask you as to whether or not that the price shown on the invoice 3195-Q is the so-called going price in that town on the day shown on that
40647 invoice.

A. This is the going price on car delivery to this town on this day.

Q. How do you know that?

A. Because there is nothing on here to indicate that it is a contract.

Q. Well, when did it become effective, if you say it is a going price? Did it become effective on that day, or some previous day?

A. Why, the effect of price is evidently prior to this date.

By Mr. MacIntyre:

Q. Well, can you tell me whether or not that there was still another effective price on a different level that
40648 you had quoted—another going price that you had quoted on a different level prior to that date but effective on a subsequent date for that town?

Mr. Withrow: May we have that question?

(Question read.)

Mr. Withrow: Your Honor, I object to the question. It is absolutely meaningless.

Trial Examiner Norwood: I do not think it is very clear.

Can't the Counsel state his objections now, if any?

Mr. MacIntyre: Well, I don't know why the documents were offered, and I am attempting to find out whether or not that any of the information that is contained on it would have any certainty or any relevancy or any materiality.

Trial Examiner Norwood: He has shown what that cement was sold at on the date of the invoice.

Mr. MacIntyre: I did not understand it that way, so we will have to object to it as it stands and attempt to convince Your Honor on recross examination that that is not the fact, through further examination of the witness, so we do object to the invoices now offered on the grounds that they are incompetent, irrelevant, and immaterial. They are incompetent for the reason that they are uncertain and no one can determine from the information that is shown on them whether or not it is the go-

40649 ing price as has been indicated in the record up to this point.

They are irrelevant and immaterial because it has not been shown that the prices are any different from those quoted by the competitors of the company for that town on this date as charged by the Commission in its complaint, and unless they stand ready to show that they are different of course they would not be adding anything to their defense.

Mr. Withrow: Well, those documents, starting with 3123, and 3187 through 3194, show the price situation in Pittsburgh at the time the Medusa Company opened
40650 its warehouse for trucking on an f. o. b. warehouse price and show the negotiations leading up to the discontinuance of that warehouse, the negotiations between the Medusa Company and the Houston Star Company.

(RESP. EXS. 3190, 3191, 3192, 3193 and 3194, were offered and received in evidence.)

(RESP. EXS. 3123-A, 3123-B, 3187-A and B, 3188, and 3189, were offered and received in evidence.)

(RESP. EXS. 3195-A to 3195-Z-2, was offered and received in evidence.)

40652 *Recross-Examination by Mr. MacIntyre.*

Q. Mr. Dawson, referring you to Respondents' Exhibit 3195-D, and 3195-G, can you tell me on what day that the price change indicated by those two invoices was quoted by your company for the first time?

A. No, not without supporting data. When the prices were effective I can't tell.

Q. Can you tell me on what day they became effective for the first time?

A. No, not without supporting data.

Q. Can you tell me how far in advance of the date shown on either of those two invoices that the order was placed for the cement shipped under the invoices?

A. No, it would not indicate it here, unless it is truck delivery in both cases, and evidently ordered out at the time or just prior to the time of delivery.

Q. When you say "evidently" what do you mean by that, Mr. Dawson?

A. Well, on truck shipment it is not customary to

order two or three days ahead of time, or even a week ahead of time. It is generally spot business.

40653 Q. Is it your testimony, Mr. Dawson, that you have not made deliveries by truck in truckload quantities that were not ordered as much as a month in advance of the day of the delivery?

A. No, that is not my testimony.

Q. Well, how can you testify now that those particular shipments were not ordered in advance of the day on which the shipment was made?

A. I stated it was the usual procedure to call up and order.

Q. So you are surmising from the usual procedure that that is what took place in this instance?

A. In this case I am surmising.

Q. But you have no direct knowledge other than your surmise?

A. Without go supporting data I have not.

Q. Now, isn't it a fact that your testimony with respect to these matters would apply as to all the other invoices under Respondents' Exhibit 3195?

A. There are some car shipments here. I do not know when they were ordered.

Q. If you do not know when those shipments were ordered, how can you tell us that the price shown on the invoices was the going price for that location on the date that the order was placed?

A. For the reason that the price appearing on here is the going price on spot shipments, and there is
40654 nothing in there to indicate that there is any contract shipments.

Q. Is it your testimony that the prices shown on there, on the invoices, were the going prices on the days shown on the invoices?

A. Why, these are the going prices on the date as appearing on this invoice.

Q. Well, how do you know that since you do not know the date on which the order was placed?

A. Because this is a spot shipment.

Q. Spot shipments can be made 15 days—I mean orders for spot shipments can be made 15 days in advance of the shipments?

A. That is true.

Q. And price changes can occur in the meantime?

A. In the event of an increase in price the dealer has protection; in the case of a decrease we have to ride down with the decrease from the time it became effective.

Q. In the case of an increase between the day on which the order was placed and the day on which shipment was made on spot business, you could not tell from the face of the invoice whether or not the price shown on the invoice was the current price on the day shown on the invoice, could you?

A. Read that, please.

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. Sellers: Do you understand it?

40655 The Witness: No, I do not. Will you kindly rephrase it?

Trial Examiner Norwood: Well, if you are making the shipment on a previous order after accepting which you had raised the price, would anything in the invoice show that situation?

The Witness: No, I don't think it would.

Trial Examiner Norwood: Can you say that none of those invoices represent such situations as that?

The Witness: There might be a possible chance, Your Honor, of a purchase made on a 15-day delivery, subsequent change taking place. Now, that is possible.

Trial Examiner Norwood: But doesn't the term—

The Witness: It doesn't say so on here.

Trial Examiner Norwood: Doesn't the term "spot shipment" mean for immediate delivery at present going prices?

The Witness: That is what I am referring to.

By Mr. MacIntyre:

Q. Within 15 days?

A. If there is no change in price.

Q. You can ship within 15 days at the price quoted with the order?

A. If there is no change.

Q. If the price goes up in the meantime it will not show on the invoice that the current price was the

40656 current price at the date of the invoice?

A. No, I don't think that would appear on there.

Q. You cannot tell from these invoices whether or not such situations occurred during the period covered by these invoices, can you?

A. Only that one condition might occur; that would not reflect a spot price.

Q. Well, on more than one occasion within the group of invoices that you have there; is that correct?

A. That is right.

Q. Now, as to the cases of price declines, that is handled by credit memorandums, isn't it, and would not show on the—that is, on the face of the invoice, itself?

A. No, I—here is a case, is a corrected price, is $1.92 per supplement No. 8, issued—I imagine this is a memorandum, it says "M" on here—issued 9-27-37.

Mr. Withrow: Is that reduced that price?

The Witness: Yes, it does.

By Mr. MacIntyre:

Q. By how much?

A. Well, it reduces it from $2.07 to $1.92, so that would be 15 cents.

Trial Examiner Norwood: Was that settlement made by reason of price change?

40657 The Witness: Yes. This is a case of reduction.

By Mr. MacIntyre:

Q. On what day did that reduction take place?

A. Evidently on September 27th.

Q. When you say "evidently," what do you mean?

A. That is the date shown on this notation here.

Q. All of your credit memorandums, all notations as to credit memorandums that you place on invoices indicate precisely the date on which price changes occur?

A. I cannot answer that question. The date is on here, whether it is the date the supplement was issued or the date that the price change was effective, I cannot say. It must be either one.

Q. But you cannot tell which?

A. I cannot tell which, from this reference here.

Q. And that is likely to be on a price decline one day, five days from another; is that correct?

A. Well, here is an invoice rendered on September 24th. This date appearing on here is September 27th, so it is right in between that period.

Q. Now, you have stated on your previous testimony concerning these particular invoices that they indicate on their face the going prices on the day shown on the invoice in that town?

A. That is right.

Q. Well, forgetting for the moment the uncertainty as to the accuracy of that statement which you have
40658 indicated on record, I will ask you whether or not you mean by the term "going price or prices" the level of prices quoted by your competitors in that town as of those dates?

A. It is the lowest price we found these days.

Q. That is the level of prices quoted by your competitors?

A. I do not know whether it is competitors or not. It might have been one, it might have been two. It is the lowest price we found; we knew of no change, and we invoiced on this basis.

Q. When you say "going prices," you indicate it was the same as at least one price quoted by your competitor in that town on that day?

A. It might have been one price.

Q. One or more competitors?

A. Maybe so; I don't know.

Q. And how do you know that your company had any information as to that point concerning your competitors on any one of those days?

A. Well, I think the salesman or the dealer would not pay us any more than the competitor was charging.

Q. I do not think your answer answers my question, Mr. Dawson.

Mr. MacIntyre: Please read the pending question.

Trial Examiner Norwood: Read it.

(Question read.)

A. I do not know that we have the information
40659 on that one day that the shipment was made.

By Mr. MacIntyre:

Q. So in your reference to the phrase "going price" you again surmise that from the general policy of your company that was probably what happened there?

A. No, I said it was our price on that day,—our going price.

Q. Well, I am trying to determine what you mean by that term, "going price." You have stated one time you thought it was that price or at least one or more of your competitors. Now, you say it is your price.

A. All right. I will straighten it out. It was a quoted

price we had made and was in effect at the time the shipment was made.

Does that straighten it?

Trial Examiner Norwood: And so far as you knew, it was as low as the lowest price any competitor was making?

The Witness: That is right. It was our quoted price.

By Mr. MacIntyre:

Q. Do you know whether or not it is any different from the basing-point price plus the rail freight to that destination?

A. No, I do not.

Mr. MacIntyre: I submit, if Your Honor please, that the recross-examination has disclosed that the in-
40660 formation contained in these documents, Respondents' Exhibit 3195, are incompetent by reason of their uncertainty, and that they are irrelevant and immaterial, and I move to strike them.

Trial Examiner Norwood: I cannot say that they are immaterial for all purposes.

Mr. MacIntyre: I move to strike them from the record.

Trial Examiner Norwood: I shall deny the motion.

Q. Now, Mr. Dawson, referring to Respondents' Exhibit 3187-A and B, and 3123-A and B, can you tell me whether or not that on the dates shown on those two documents you were making deliveries from this warehouse in Pittsburgh, Pa., to trucks on an f.o.b. warehouse basis?

40661 A. Respondents' Exhibit 3187-A gives the price at—

Q. You are not answering the question.

Mr. MacIntyre: Please read the question.

Trial Examiner Norwood: Read the question.

(Question read.)

A. This is f.o.b. destination here.

Q. That is what those documents show, but I am asking you whether or not it is the fact that on those two dates you were also making deliveries f.o.b. that warehouse to trucks?

40662 A. I cannot tell from these documents whether it is an f.o.b. warehouse price involved.

Q. You do not know whether or not your company was

selling for truck deliveries in Pittsburgh f.o.b. its warehouse on those dates?

A. No, I do not, from these documents.

Q. And is it your testimony that those documents should be taken as showing that no deliveries were made f.o.b. a warehouse of the Medusa Company in Pittsburgh on those dates?

A. I do not know whether we had a warehouse there on these days. Here is January 27 and March 3.

Q. Well, I will ask you when Medusa established this warehouse that is referred to in Respondents' Exhibit 3189, dated April 13, 1931?

A. On or about April 13, 1931.

Q. You cannot tell whether or not it was before March 3, 1931?

A. Well this document here speaks for itself. It announces that Medusa and Crescent plain gary cement is now available at the warehouse West Twenty-third 40663 Street, P. & L. E. Railroad, Pittsburgh.

Q. Well, are you able to testify after examining those documents that from and after April 13, 1931, that cement was available to buyers' trucks at your warehouse in Pittsburgh f. o.b. the warehouse?

A. No, I cannot tell you whether it was f.o.b. the warehouse or not.

Q. You do not know on what basis your company sold cement there, do you?

A. Not back in 1931 without having some supporting data here to refer to.

Q. And do any of these documents that Mr. Withrow has just put into evidence inform you on that?

(There was a short pause while the witness examined the exhibits.)

A. There was nothing in these documents that would say whether the price was f.o.b. trucks at the warehouse or not.

Q. Now, can you tell me on what date your company refused to permit deliveries to trucks on any basis in Pittsburgh?

A. Restate that, please.

Trial Examiner Norwood: Read it.

(Question read.)

A. December 1, 1931.

By Mr. McIntyre:

Q. Subsequent to that date you did not deliver on 40664 any basis; is that correct?

A. No, we were delivering by truck subsequent to that, or prior to that, and subsequent we went on a car basis.

Q. And did not deliver to truck on any basis; is that correct?

A. Yes.

Q. Subsequent to that date all deliveries were by railroad car in Pittsburgh?

A. That is in the instructions contained in this letter to the district sales manager.

Q. Well, do you know anything different?—

A. No, I do not.

Q. —from what the instructions show?

A. Unless there is something else at a later date here (examining the papers). No, I cannot find anything else on it.

Q. Can you tell us why your company selected the date December 1, 1931, to notify the trade that it was discontinuing deliveries to trucks in Pittsburgh?

A. Evidently the first of the month dating, because there is a lot of correspondence leading right up to that prior to December 1st.

Q. Dated about December—I mean November 28th?

A. Oh, no, no. This starts back here November 20th; it starts in November, the 20th.

Q. You know nothing about the circumstances 40665 leading up to the discontinuance there of trucking of cement other than what is shown by those documents; is that correct?

A. Well, I know it was an expensive proposition, and we were losing money on it. We were anxious to discontinue.

Mr. MacIntyre: I did not get that last. Will you read that last, please, Mr. Reporter.

(Answer read.)

By Mr. MacIntyre:

Q. You cannot tell us what, if any, relationship your discontinuance there, or order for the discontinuance there in November, 1931, had to meetings that your company had

with representatives of its competitors and railway officials in New York during July, 1931, and in Chicago in August, 1931, do you, or can you?

A. No, I cannot answer that.

Q. Or the subsequent meetings that were held in Chicago in 1931?

40666 A. I have no knowledge—pardon me.

Trial Examiner Norwood: Go ahead.

Mr. Withrow: Go ahead.

A. I have no knowledge of the meetings or any connection that would tie in here at all.

By Mr. MacIntyre:

Q. Do you not know that Mr. D. H. MacFarland, who was then president of The Cement Institute, and also a vice-president of Medusa Portland Cement Company, attended one of these meetings—the one in New York—in July, July 22, 1931?

A. I had no knowledge of it.

Q. Did your ever discuss that problem with Mr. MacFarland?

A. No, I do not think I have. In fact, I know I have not.

Q. The first question that Mr. Withrow asked you
40667 on redirect had to do with reference to invoices of your company, and you stated in reply to that that invoices would show when an order had been given your company, the order number, as that order had been entered, whether it was on a specific job contract or otherwise. Do you recall that testimony?

A. I did not say that.

Q. What was your testimony, then?

A. My testimony was that on a contract we show on our invoices the contract number. The office work sheet shows the date of the contract and also carries the number.

Q. But you cannot determine from your invoices the date of the contract?

A. No, you cannot.

Q. That is from anything on the face of the invoice?

A. Oh, yes, you can get reference to the contract number, but you have to go back.

Q. To something else?

A. To the contract, yes.

Q. And until you have done that you cannot tell what—until you have done that you cannot tell by examining the invoice what the going price, as you term it was, in a particular town on the day that the order was taken under such contract?

40669 Q. That is, you cannot determine that until you have checked this work sheet in your office, which contains the information as to dates on which price changes occurred, the dates that the contracts were entered into?

Mr. Withrow: Same objection.

Trial Examiner Norwood: Overruled.

A. That is right? The work sheets will show any 40670 adjustment from the original contract.

By Mr. MacIntyre:

Q. But you must have recourse to that before you can tell what the price was that prevailed on the day the contract was entered into, the number of which is shown on the invoices?

A. That is right.

Q. And can you do that in case of price advances?

A. In case—are you through? Pardon me.

Q. Yes.

A. Did you ask a question, in the case of a price advance,—you do not increase the price of your contract.

Q. So you could not determine the current market price or the price—yes, the current market price on the day that the contract was entered into if there had been price advances since that, but even by referring to your so-called work sheet in your office, can you?

A. The contract would not be affected. There would be no object in making a notation.

Q. So you would not make a notation, therefore, even by going back to your work sheet you could not tell what changes and the dates of the changes had been since the price increases had taken place, since the day the contract had been entered into?

A. The price increase is there is no record made, so far as that particular contract is concerned.

Q. So you could not even determine all that in- 40671 formation by going back to your work sheets?

A. No. You would just get the adjustments of price to the contract itself.

Q. Yes.

Now, on redirect, Mr. Withrow called your attention to Commission's Exhibit 1817, and you described that as the usual and typical invitation, invitations as sent out by the State of Illinois. Do you recall that testimony?

Mr. Withrow: What was that exhibit number?

Mr. MacIntyre: 1887, Commission's exhibit.

By Mr. MacIntyre:

Q. Do you recall that testimony?

A. I do not know as I used the same phraseology, but I remember the testimony, yes.

Q. Don't you remember describing that and characterizing it as the usual type of invoice or invitation sent out by the State of Illinois?

A. I remember the one that Counsel for the Respondent was showing me, and it looked quite familiar. I believe I said so.

Q. You said it was the usual thing; do you recall?

A. Well, I might have said usual. I do not recall saying that.

Q. Now, I will show you Commission's Exhibit 1893, and to page 12 of that exhibit under the caption 40672 "Prosopal," that invitation from the State of Illinois required that—that was in 1933—required that the bidder submit a bid on alternate A, calling for f.o.b. mill bids, and also on alternate B, calling for delivered prices, didn't it?

A. Well, this is not the same one I was looking at.

Q. No, that is not the one that you described as the usual one this morning. That is a different one.

A. On the form submitted this morning, I do not remember seeing this supplemental sheet here.

Q. So you would say if that was the Illinois invitation you saw this morning, you would have to modify your testimony that it was the usual practice of the State of Illinois to call for only destination prices?

A. The one I looked at this morning reflected that.

Q. But this reflects something else?

A. This one reflects something else.

Q. So, now, which one would you describe as being the usual and customary type of invitation sent out by the State of Illinois?

A. I would say the other one, the one that Mr. Withrow had here this morning.

Q. How—what do you use as a basis for that statement?

A. Because prior to 1933 I do not recall them asking for an alternate bid.

Q. You did not tell us this morning that you recall
40673 any one of this kind in 1933, so it is possible that there were some that preceded 1933, of the character of the one that I am showing you?

Mr. Withrow: Your Honor, I object to spinning this out. It is not proper recross-examination. I have let him go pretty far. The record shows the exhibit he is now showing the witness is the only instance where the State of Illinois asked on that basis.

Trial Examiner Norwood: The objection is overruled.

Mr. Withrow: All the other invitations are in evidence, and we insist they go in evidence to show that they requested only on delivered prices, and this is not proper recross-examination.

Trial Examiner Norwood: I think that he may ask this witness—get what he knows about this. This goes to the basis of his earlier statements.

Read the question.

(Question read.)

By Mr. MacIntyre:

Q. That you do not now recall?

A. I never heard of it.

Q. Well, is it your testimony that the State of Illinois did not, prior to 1933, send out an invitation such as the one you are now looking at, Commission's Exhibit 1893?

A. If it was, it was never called to my attention.
40674 Q. But you are not prepared to testify that they did not send out such invitations prior to 1933?

A. No.

Q. Now, calling your attention to Commission's Exhibit 1894, about which Mr. Withrow asked you, do you mean to testify, Mr. Dawson, that you know what was in the mind of Governor Horner when he wrote that letter to Mr. John; president of your company, as to making an offer for an f.o.b. mill bid?

A. No, I cannot answer that.

Q. Well, then, are you prepared to testify as to whether or not it related solely to a prior invitation?

40675 A. No.

Q. So the testimony you gave to Mr. Withrow on redirect to the effect that it related to a prior invitation you want modified to the extent, now, to the extent that it related to that and probably other things?

A. The date contained in this letter, in Mr. John's letter, refers back to and acknowledges a letter from Governor Horner on April 25; that is the only way I can tie these two letters together at the present time.

Q. That is all you know about it?

A. That is the only way I can tie these two letters together at the present time.

40676 Q. Well, isn't that the extent of your knowledge, as to just what you see there, as to the relationship of the dates?

A. Do you mean the relationship of these days right here?

Q. The relationship of the two dates; isn't that all that you know about the relationship of the two letters?

A. No, I would not say so.

Q. Well, what do you know?

A. Well, before I was on the stand here I do not remember seeing Mr. John's letter of May 1st, but I knew about the discussion.

Q. What discussion?

A. With Mr. John.

Q. Do you mean discussions he had with Governor Horner?

A. No, no, discussions—

Q. Well?

A. —in our office.

Q. Between you and Mr. John?

A. I would not say between Mr. John and myself; within the organization.

Q. Well, what did that have to do with the manner in which you relate these two dates, and thereby relate the two letters this morning?

A. This letter of April 25 refers back to a previous letter on April 24, evidently by Mr. John. I do not know what the letter of April 24 is. I can only say that

40677 these two letters evidently tie in with a request—

Q. Well, do you know anything more about that than what you see there now?

A. Not at the present time, no.

Q. So you want all the testimony you have given here to be modified to that extent, then; is that correct?

A. Only that I was familiar with the discussion of things,—we were discussing in our office, within our organization.

40678 Q. Mr. Dawson, on redirect you explained to Mr. Withrow that the expense in connection with the sale of 425,000 barrels of cement to the State of Wisconsin, as is shown by Respondents' Exhibit 3180, had been charged to administrative expenses; do you recall?

A. No, I did not say that.

Q. What did you testify?

A. He asked me whether or not I considered that the salary and expenses of Mr. John, Mr. Vanderwerp, and myself were not selling expenses. I told him we considered them as administrative expenses.

Q. Well, such expenses as they were, whether you considered them administrative or sales expenses, and irrespective of the manner in which they were charged, did they equal, on a per-barrel basis, the sales expense which you incurred in making sales in that territory during that period on other business?

40679 A. No, it did not.

40680 Q. Were they lower per barrel?

A. Yes, they were.

Q. Now, on redirect you told Mr. Withrow concerning this 80-cent price that you named to Castalia Portland Cement Company, that it was satisfactory under the conditions, and then you added "the going price" at that time. What did you mean by that last phrase, "the going price at that time"?

40681 Trial Examiner Norwood: Did you mean the current price?

The Witness: Yes, I meant the current price.

Trial Examiner Norwood: Go ahead.

By Mr. MacIntyre:

Q. Was 80 cents the current price at that time, Mr. Dawson?

A. No, I would not say that.

Q. Well, what did you mean by the use of the phrase that you made, "the going price at that time"?

A. I meant the 80 cent price seemed to compare favorably with the current price at that time we were getting for other business, after making allowance for their sales expense. The price was satisfactory to them and was satisfactory to us.

Q. You mean that on your other business you were not getting 80 cents per barrel at that time?

A. I did not say that.

Q. Well, what do you mean by the use of that term?

A. I said that there is consideration there to compensate Castalia for their selling expenses. We did not sell it for them.

Trial Examiner Norwood: Well, that was a special price, wasn't it?

The Witness: Why, sure, it was. It was a special price, satisfactory to Castalia and ourselves.

10682 Trial Examiner Norwood: And not a going price?

The Witness: No, but after making the compensation for their selling expense, there seemed to be that prevailing price we were getting for other business.

10684 Mr. Wooden: Referring to the motion made by Respondents' Counsel at pages 39468 and 39469 of the record as to the striking from the record of certain exhibits and testimony relating to T. V. A., I have checked the list of exhibits contained in the motion.

As to some of them I find that they have no reference to T. V. A. at all. I refer particularly to Commission's Exhibit 576-4-P, 4-Q and 576-5-H.

Trial Examiner Norwood: They refer to costs and profits.

Mr. Wooden: I do not believe they relate to that. They certainly have nothing to do with T. V. A., and I do not believe they relate to that subject at all.

Trial Examiner Norwood: All right.

Mr. Wooden: I do not find Commission's Exhibit 346-F in the record at all, and yet it is included in the mo-

10685 tion to strike.

Now, on May 21, at page 39847 of the record, I added to my motion to withdraw certain exhibits certain matters that I had overlooked in connection with my previous motion to withdraw.

To that I now wish to add to my motion to withdraw or strike the following exhibits:

Commission's Exhibit 356 and Commission's Exhibit 562-10-E.

As to Commission's Exhibit 354-A to D and Commission's Exhibit 355-A and B, inclusive, I find that they contain an incidental reference to a certain figure on depreciation, very incidental. I now wish to move that that reference to that particular subject be eliminated from those exhibits, but not the remainder of the exhibits.

I am now referring to the last two exhibits mentioned, 354-A to D, and 355-A and B.

As to the remainder of the exhibits moved by Counsel for Respondents to be stricken, I oppose their motion and point out that they include many exhibits that relate to T. V. A. and do not at all relate to the subject of costs or prices. Many of them relate to the filing of prices on T. V. A. business under the Code and matters relating to such facts.